No. 89-1027-CFX
Status: GRANTED

Title: Norfolk and Western Railway Company, et al., Petitioners
v.
American Train Dispatchers Association, et al.

Docketed:
December 28, 1989

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
89-1028

Counsel ~~for~~ petitioner: Berlin,Jeffrey S.

Counsel for respondent: Mahoney,William G., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 28 1989	G	Petition for writ of certiorari filed.
3	Jan 16 1990		Order extending time to file response to petition until February 28, 1990.
4	Jan 16 1990		The above extension is for all respondents.
5	Jan 29 1990		Brief amicus curiae of National Railway Labor Conference filed. VIDED.
8	Feb 6 1990		Brief of respondent United States in opposition filed. VIDED.
6	Feb 27 1990		Brief of respondent American Train Dispatchers in opposition filed. VIDED.
7	Feb 28 1990		DISTRIBUTED. March 16, 1990
9	Feb 28 1990	X	Brief amicus curiae of Consolidated Rail Corporation filed. VIDED.
10	Mar 8 1990	X	Reply brief of petitioner Norfolk and Western Railway filed.
13	Mar 19 1990		REDISTRIBUTED. March 23, 1990
14	Mar 26 1990		Petition GRANTED. The case is consolidated with 89-1028, and a total of one hour is allotted for oral argument. **
16	Apr 30 1990		Order extending time to file brief of petitioner on the merits until May 25, 1990.
17	May 23 1990	G	Motion of respondents American Train Dispatchers' Association, et al. to dismiss filed.
18	May 25 1990		Joint appendix filed. VIDED.
19	May 25 1990		Brief of petitioner Norfolk and Western Railway filed.
20	May 25 1990		Brief amicus curiae of National Railway Labor Conference filed. VIDED.
21	May 25 1990		Brief of respondent United States in support of petition filed. VIDED.
26	May 29 1990		Order extending time to file brief of respondent on the merits until July 20, 1990.
22	May 30 1990	*	Opposition of federal respondents to motion of respondents American Train Dispatchers' Association, et al. filed. VIDED.
23	May 31 1990	D	Application (A89-856) by respondents to file a brief on the merits in excess of page limits, submitted to The Chief Justice.
24	Jun 1 1990		Application (A89-856) denied by the Chief Justice.
27	Jun 1 1990		Brief of petitioners in response to motion to dismiss filed.
29	Jun 1 1990		DISTRIBUTED. JUNE 7, 1990. (MOTION TO DISMISS).
28	Jun 11 1990		Motion of respondents American Train Dispatchers'

No. 89-1027-CFX

Entry	Date	Note	Proceedings and Orders
			Association, et al. to dismiss GRANTED. is deferred for 120 days. Further briefing in this case is suspended for 120 days.
30	Jun 11 1990	G	Motion of the Acting Solicitor General for divided argument filed.
37	Jun 11 1990	D	Motion of respondents American Train Dispatchers' Association, et al. to dismiss filed.
31	Jun 29 1990		Lodging from Solicitor General received and distributed.
32	Aug 28 1990		Record filed.
		*	Certified copy of original record and proceedings received.
40	Sep 10 1990		Order extending time to file brief of respondent on the merits until November 9, 1990.
33	Sep 19 1990		Supplemental brief of respondent American Train Dispatchers filed. VIDED.
34	Sep 26 1990		DISTRIBUTED. Oct. 12, 1990. (Motion of respondents American Train Dispatchers' Association, et al., to dismiss).
35	Sep 28 1990	X	Supplemental brief of petitioner Norfolk and Western Railway in response to motion filed.
36	Sep 28 1990	X	Brief of respondent United States in response to the supplemental memorandum of the Union respondents in support of the motion to dismiss filed. VIDED.
38	Oct 15 1990		Motion of respondents American Train Dispatchers' Association, et al. to dismiss DENIED.
41	Oct 19 1990		SET FOR ARGUMENT MONDAY, DECEMBER 3, 1990. (4TH CASE)
42	Oct 29 1990		Motion of the Acting Solicitor General for divided argument GRANTED.
44	Nov 8 1990		CIRCULATED.
43	Nov 9 1990	X	Brief of respondents American Train Dispatchers, et al. filed. VIDED.
45	Nov 21 1990	X	Reply brief of petitioner United States filed. VIDED.
46	Nov 21 1990	X	Reply brief of petitioner Norfolk and Western Railway filed.
47	Dec 3 1990		ARGUED.
48	Dec 5 1990	P	Motion of respondent Union Respondents for leave to file a supplemental brief after argument filed.

(1) 89-1027

No. __

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,

Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 28, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

Does the exemption "from all other law" in the Interstate Commerce Act, 49 U.S.C. § 11341(a), which applies to a railroad participating in a transaction that has been approved by the Interstate Commerce Commission, extend to claims that are based on the railroad's contracts and are asserted exclusively under federal law?

LIST OF PARTIES AND RULE 28.1 LIST

The names of the parties to the proceeding are contained in the caption.[1]

The common stock of petitioners Southern Railway Company and Norfolk and Western Railway Company is wholly owned by Norfolk Southern Corporation. The other subsidiaries and affiliates of petitioners are:

Southern Railway Company subsidiaries:

Airforce Pipeline, Inc.
Alabama Great Southern Railroad Company, The
Atlantic and Charlotte Air Line Railway Company, The
Atlantic and East Carolina Railway Company
Camp Lejeune Railroad Company
Central of Georgia Railroad Company
Charlotte-Southern Hotel Corporation
Chattanooga Station Company
Chattanooga Terminal Railway Company
Cincinnati New Orleans and Texas Pacific Railway Company, The

[1] The decision of the Court of Appeals also covered the court's Case No. 88-1724, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*. The parties in Case No. 88-1724 were petitioner Brotherhood of Railway Carmen, Division of Transportation-Communications International Union; respondents Interstate Commerce Commission and United States of America; and intervenor CSX Transportation, Inc. The two cases were not formally consolidated—indeed, a motion for consolidation filed by the labor union parties was denied—but they were argued before the same panel on the same day. Petitioners Southern Railway Company and Norfolk and Western Railway Company understand that CSX Transportation, Inc. will also be filing a petition for a writ of certiorari with respect to the D.C. Circuit decision for which review is sought herein.

Citico Realty Company
Elberton Southern Railway Company
Georgia Midland Railway Company, The
Georgia Northern Railway Company, The
Georgia Southern and Florida Railway Company
Highpoint, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company
Live Oak, Perry and South Georgia Railway Company
Louisiana Southern Railway Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
National Investment Company, The
New Orleans Terminal Company
Norfolk and Portsmouth Belt Line Railroad Company
North Carolina Midland Railroad Company, The
St. Johns River Terminal Company
South Western Rail Road Comapny, The
Southern Rail Terminals, Inc.
Southern Rail Terminals of Alabama, Inc.
Southern Rail Terminals of North Carolina, Inc.
Southern Railway-Carolina Division
Southern Region Coal Transport, Inc.
Southern Region Industrial Realty, Inc.
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Transylvania Railroad Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company

Norfolk and Western Railway Company subsidiaries:

Chesapeake Western Railway
Fort Wayne Union Railway Company
Lake Erie Dock Company
Norfolk and Portsmouth Belt Line Railroad Company
Scioto Valley and New England Railroad Company, The
Shenandoah-Virginia Corporation
Toledo Belt Railway Company, The
Wabash Railroad Company

Norfolk Southern Corporation subsidiaries (in addition to Southern Railway Company and Norfolk and Western Railway Company):

Arrowood-Southern Corporation Company
Arrowood-Southern Executive Park, Inc.
Atlantic Investment Company
Charlotte-Southern Corporation
Lamberts Point Barge Company, Inc.
Lamberts Point Docks, Inc.
Nickel Plate Improvement Company, Inc.
Norfolk Southern Industrial Development Corporation
Norfolk Southern Properties, Inc.
North American Van Lines, Inc.
NS Fiber Optics, Inc.
NS Transportation Brokerage Corporation
NW Equipment Corporation
Pocahontas Development Corporation
Pocahontas Land Corporation
Sandusky Dock Corporation
Triple Crown Services, Inc.
Virginia Holding Company

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IN THE

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OCTOBER TERM, 1989

No. ___

NORFOLK AND WESTERN RAILWAY COMPANY and SOUTHERN RAILWAY COMPANY,

Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Norfolk and Western Railway Company ("NW") and Southern Railway Company ("Southern") request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which was entered on July 25, 1989, and amended on September 29, 1989.

OPINIONS BELOW

The July 25, 1989 decision of the Court of Appeals is reported at 880 F.2d 562 and is reprinted in the Appendix to this Petition ("App.") at 1a. The Court

of Appeals' order of September 29, 1989, amending the decision, is not reported and is reprinted in the Appendix at 27a. The decision of the Interstate Commerce Commission dated May 28, 1988, which was the administrative decision under review in the Court of Appeals, is not reported and is reprinted in the Appendix at 29a.

JURISDICTION

The Court of Appeals entered its decision on July 25, 1989. NW and Southern filed a timely petition for rehearing, which was denied in an order entered on September 29, 1989. This petition is timely filed. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

49 U.S.C. § 11341(a), a section of the Interstate Commerce Act, provides:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

STATEMENT OF THE CASE

In 1982, the Interstate Commerce Commission ("ICC") approved the coming together of NW and Southern, petitioners here, under the common control of Norfolk Southern Corporation ("Norfolk Southern"). *Norfolk Southern Corp.—Control—Norfolk & Western Ry. and Southern Ry.*, 366 I.C.C. 173 (1982) ("*Norfolk Southern Control*"). The ICC authorized the consolidation of facilities among the various Norfolk Southern-controlled railroads in the interest of operational efficiency, and directed, in accordance with a provision of the Interstate Commerce Act, 49 U.S.C. § 11347, that employees affected by any such consolidations—including those not detailed in the original Norfolk Southern operating scheme—were to receive the extensive benefits (including wage protection for up to six years) prescribed in the ICC's

"*New York Dock*" employee protective conditions.[2] 366 I.C.C. at 230-31.

In 1986, as part of the ongoing process of consolidating their operational functions, NW and Southern decided to consolidate at one location the function of "distribution of power"—the assignment of locomotives to particular trains and facilities. Until then, power distribution on NW was performed in a facility in Roanoke, Virginia (the System Operations Center, or "SOC") by employees known as "SOC supervisors," who were represented by respondent American Train Dispatchers Association ("ATDA") and worked under a labor agreement to which the parties were NW and ATDA. In contrast, power distribution on Southern was performed in Atlanta, Georgia, by company officers—nonunion management employees known as Superintendents Transportation-Locomotive ("STLs").

The railroads proposed that power distribution for the entire Norfolk Southern system would now be performed by Southern at its Atlanta facility. Because this rearrangement was to be carried out under authority of the ICC's original *Norfolk Southern Control* decision, the railroads recognized that the *New York Dock* protective conditions would apply. Accordingly, as required by Art. I, § 4 of the protective conditions, the railroads notified ATDA of the proposal and offered to negotiate an "implementing agreement" to cover the transaction.[3]

[2] These conditions were adopted by the ICC in *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

[3] Art. I, § 4 of the protective conditions requires the railroad to give 90 days' written notice of a transaction that "may cause the dismissal or displacement of any employees, or rearrangement of forces," and, if requested, to negotiate an "agreement with respect to application of" the protective conditions to the transaction. The section also provides that "[e]ach transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." If the parties are unable to agree on the terms of this so-called "implementing agreement," either party may submit the dispute to binding arbitration. 360 I.C.C. at 85.

Negotiations failed. The railroads wanted Southern to continue to handle power distribution using STLs, and they proposed to offer all the NW SOC supervisors management jobs as Southern STLs. This would result in the employees' receiving substantial *increases* in wages and benefits, as well as the assurance of six years' wage protection under the *New York Dock* conditions. ATDA maintained, however, that the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), and the SOC supervisors' labor agreement would not permit this result, and that the NW power distribution work could be moved to Atlanta only if it were performed there by NW's SOC supervisors working under the existing NW/ATDA labor agreement.

The railroads invoked arbitration under Art. I, § 4 of the protective conditions, and, following a hearing, the arbitrator issued an award in which he imposed an implementing agreement.[4] He authorized the trans-

[4] *Norfolk & Western Ry. and Southern Ry. and ATDA*, May 19, 1987 (Harris, Arb.). The arbitrator's award was reproduced

fer of work from Roanoke to Atlanta as proposed by the railroads. He also ruled that NW SOC supervisors who accepted STL positions with Southern could not carry their existing labor agreement with them to Atlanta but would become Southern officers. The implementing agreement he imposed provides, *inter alia*, that "[w]here rules, other agreements and practices conflict with this agreement, the provisions of this agreement shall apply." J.A. 168.[5]

ATDA sought review of the award by the ICC.[6] The ICC affirmed the award in all respects, holding, *inter alia*, that the arbitrator

> correctly found . . . that the terms of [*Norfolk Southern Control*] and specifically the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements. Moreover, an action taken under our control authorization is immunized from conflicting laws by section 11341(a). The proposed transfer, although not specifically mentioned in *Norfolk Southern Control*, is one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that we approved.

App. 35a (citations omitted). On the merits of the case, the ICC agreed with the arbitrator's decision not to impose the NW/ATDA labor agreement on work in the consolidated Atlanta office—relief sought by ATDA—finding that to impose that agreement "would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function." App. 37a.

ATDA sought judicial review of the ICC's decision under 28 U.S.C. §§ 2321(a) and 2341 *et seq.*[7] In the Court of Appeals, ATDA's principal contention was that the ICC exceeded its jurisdiction by upholding the arbitrator's authority to allow the transfer of work rather than remitting the parties to the RLA pro-

in the Joint Appendix ("J.A.") below at 139. Technically, the award was rendered by a three-person "committee" or "panel" established by agreement of the parties; the panel consisted of a neutral referee (the arbitrator), one member representing the railroads, and one member representing the union. For this reason, the ICC decision below refers to the award as the "panel's" decision. The railroad member of the panel concurred in the arbitrator's award and the union member dissented.

[5] The transfer of power distribution work took place on June 6, 1987. Southern offered STL positions to all nine active and all three furloughed NW SOC supervisors, and nine of the total accepted and moved to Atlanta.

[6] The ICC exercises the authority to review the awards of arbitrators acting under the employee protective conditions. *International Brotherhood of Electrical Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988). *See United Transportation Union v. Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987) (arbitration award is not reviewable under RLA but is exclusively subject to review under Interstate Commerce Act), *cert. denied*, 484 U.S. 1006 (1988).

[7] ATDA filed its petition for review in the United States Court of Appeals for the Eleventh Circuit. NW and Southern obtained leave to intervene in the review proceeding as of right, under 28 U.S.C. §§ 2323 and 2348 and Fed. R. App. P. 15(d). By order of September 15, 1988, the Eleventh Circuit transferred the case to the District of Columbia Circuit.

cedures for negotiating changes in agreements, 45 U.S.C. § 156.

In its July 25, 1989 decision covering this case and the companion *Brotherhood of Railway Carmen v. ICC*,[8] the Court of Appeals analyzed the cases as presenting three primary questions relating to the reach of the ICC's power under the Interstate Commerce Act: (1) whether the § 11341(a) exemption "from all other law" permits the "override" of labor agreements; (2) whether that exemption permits the override of the RLA itself; and (3) whether the ICC has authority under 49 U.S.C. § 11347, the provision requiring imposition of employee protective conditions, to displace employees' RLA remedies. The court decided only the first question. It held that § 11341(a) "does not grant the ICC its claimed power to override provisions of a [collective bargaining agreement]," App. 26a, and reversed the ICC on this point.

The court declined to decide whether 49 U.S.C. § 11341(a) "may operate to override provisions of the RLA" itself, App. 19a, because, in light of its holding that § 11341(a) does not reach agreements, "it is unclear what are the consequences, if any, of [the ICC's] rulings that the carriers need not comply with the RLA," App. 23a, and because the ICC's holding on the point supposedly departed from prior ICC decisions without adequate explanation, App. 22a-23a. The court also declined to address the ICC decision's conclusion that the arbitration procedure in the *New York Dock* conditions, adopted under § 11347, displaces RLA-derived rights, because the ICC supposedly had not relied on this ground on appeal. App. 25a-26a.

[8] See page ii, footnote 1, above.

The Court of Appeals remanded the case with respect to the issues it had not addressed "in order that the agency may determine whether further proceedings are necessary." App. 26a.[9]

NW and Southern petitioned for rehearing and filed a suggestion of rehearing *en banc*. The petition and suggestion were denied by orders issued on September 29, 1989. App. 49a, 51a.

The ICC also filed a document styled as a petition for rehearing. But the ICC did not ask the Court of Appeals to rehear the case immediately; rather, the ICC represented that it intended to conduct a proceeding on remand as directed by the court, and it asked the court "to refrain from ruling on this petition for rehearing until the Commission's decision on remand is published." ICC Pet. at 2. By order entered on September 29, 1989, the Court of Appeals directed "that consideration of the aforesaid petition is deferred pending release of the ICC's decision on remand." App. 54a. Also by separate orders entered on the same date, the Court of Appeals entered its judgment of remand, App. 47a, and amended its July 25, 1989 decision to specify that it was remanding only the "records" and not the "cases" to the ICC. App. 27a-28a. The effect of that amendment, under the court's local rule 15(c), was to make clear that the court retained jurisdiction over the matter and that it would not be necessary for a party aggrieved by

[9] The Court of Appeals did not address objections ATDA had raised based on the Fifth Amendment and 45 U.S.C. § 152 Fourth.

the ICC's eventual decision on remand to file a new petition for review.[10]

REASONS FOR GRANTING THE WRIT

The Court of Appeals has misinterpreted the command of the Interstate Commerce Act, 49 U.S.C. § 11341(a), that a person participating in a transaction approved by the Interstate Commerce Commission is "exempt from the antitrust laws and from all other law . . . as necessary to let that person . . . carry out the transaction . . . ." The Court of Appeals has now held that the reach of the § 11341(a) exemption does not extend to claims asserted under labor agreements governed by the Railway Labor Act. That holding conflicts with *Schwabacher v. United States*, 334 U.S. 182 (1948); it is inconsistent with decisions rendered by other circuit courts since 1963; and it is contrary to the repeatedly expressed intent of Congress.

The provision under review, § 11341(a), is a cornerstone of the nation's longstanding policy of fostering railroad consolidations in the interest of economy and efficiency. The exemption provision originated in the Transportation Act of 1920;[11] was reenacted in the Emergency Railroad Transportation Act of 1933;[12] was reenacted again in the Transportation

[10] The ICC is now in the process of conducting a proceeding on remand. Written comments have been solicited from the parties and interested persons, and oral argument is set for January 4. 1990.

[11] Transportation Act of 1920, ch. 91, § 407(8), 41 Stat. 456, 482, codified as 49 U.S.C. § 5(8) ("§ 5(8)").

[12] Emergency Railroad Transportation Act, ch. 91, § 202(15), 48 Stat. 211, 219, codified as 49 U.S.C. § 5(15) ("§ 5(15)").

Act of 1940;[13] and was recodified in 1978, without substantive change,[14] as § 11341(a). In each version, the operative language has been similar and the meaning has been the same: to immunize carriers from collateral legal challenges to the carrying out of ICC-approved transactions. The Court of Appeals' mistaken holding denies the past and condemns the railroad industry to a destabilized future.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN *SCHWABACHER v. UNITED STATES* AND WITH DECISIONS OF OTHER COURTS OF APPEALS.

1. The Court of Appeals erroneously held that the § 11341(a) exemption "from all other law" does not reach *contracts*. App. 12a, 18a. No party to this case made such an argument and the Court of Appeals embraced it without benefit of briefing or oral argument on the point. The Court of Appeals' holding is plainly contrary to *Schwabacher v. United States*, 334 U.S. 182 (1948).

Schwabacher held that former § 5(11) of the Interstate Commerce Act, the direct predecessor of § 11341(a), relieved carriers from private contractual obligations, to the extent necessary to carry out an ICC-approved transaction. 334 U.S. at 185-89, 194-95, 199-201. That holding forecloses the interpretation of § 11341(a) that the Court of Appeals has adopted.

[13] Transportation Act of 1940, ch. 722, § 7(11), 54 Stat. 899, 908, codified as 49 U.S.C. § 5(11) ("§ 5(11)").

[14] Pub. L. 95-473, § 3(a), 92 Stat. 1466; *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 299 n.12 (Stevens, J., concurring).

Schwabacher was a challenge to an ICC order approving the merger of the Pere Marquette Railway Company with another carrier, brought by a group of dissenting Pere Marquette preferred stockholders. In the ICC approval proceeding, these stockholders claimed that under the Pere Marquette charter, which was enforceable under the laws of Michigan, they were entitled to receive at least $172.50 per share of stock; and they objected to the proposed merger plan because it allocated them substantially less than this amount and thereby deprived them "of contract rights under Michigan law . . . ." 334 U.S. at 188. The ICC approved the proposed merger plan but left the stockholders to pursue their charter claims in state court. *Id.*

This Court, relying on, *inter alia*, § 5(11), rejected the ICC's approach and held that once the ICC approved the merger, the surviving carrier was relieved from any claims for additional payments based on rights assertedly conferred by the Pere Marquette charter. 334 U.S. at 194-95; 201-02.

Schwabacher contains many references to Michigan or state law, but, contrary to the Court of Appeals' view (App. 21a), the decision does not involve any state statute conferring a substantive right on the preferred stockholders. The references to state law relate to only two subjects: (1) the question whether, as a matter of Michigan law, a "winding up" of Pere Marquette was occurring, as it was this event that would trigger rights under the express terms of the charter; and (2) the availability of the state court system to hear and decide the claims asserted by the stockholders under their private contract with the

Pere Marquette.[15] The sole source of the stockholders' claimed right to receive $172.50 per share was the promise made in the charter, and it was this contractual promise that, by operation of § 5(11), was abrogated.[16]

Our understanding of *Schwabacher* is not new. The Court of Appeals itself has previously agreed with it. *Altman v. Central of Georgia Ry.*, 488 F.2d 1302 (D.C. Cir. 1973) (claims for payment of dividends allegedly due under the terms of a railroad's charter and bylaws are barred). *See also Snow v. Dixon*, 362

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[15] The Michigan merger statute provided that "the debts, liabilities and duties" of the merged companies "shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it." Michigan Statutes Annotated, § 22.234, quoted in *Schwabacher*, Brief for Appellants at 9.

[16] In its decision approving the Pere Marquette merger, the ICC had concluded that "[w]hether dissenting stockholders, as members of a class created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette, is a question not within our province to decide." *Pere Marquette Railway Merger, Etc.*, 267 I.C.C. 207, 248 (1947) (citation omitted). In this Court, the ICC framed the question presented as:

> Whether, in passing upon the agreement of merger here involved, . . . the Commission was required, as a condition to its approval of the merger under the provisions of Section 5 (2-13), and Section 20a (1-11) of the Interstate Commerce Act, to adjudicate and enforce the claimed contractual rights, arising under State law, of dissenting stockholders as a separate and distinct class . . . .

Schwabacher, Brief for Appellee ICC at 2. See also Brief for Appellants at 2; Reply Brief for Appellants at 2.

N.E.2d 1052 (Ill.), *cert. denied*, 434 U.S. 939 (1977); *St. Louis Southwestern Ry. v. City of Tyler*, 422 S.W.2d 780 (Tex. Civ. App. 1967). Since *Schwabacher*, the ICC itself has long asserted its authority to override contractual obligations.[17]

The interpretation of the reach of the exemption "from all other law" adopted in *Schwabacher* certainly applies here. In *Schwabacher*, the Court held that the ICC had exclusive authority to determine the rights of stockholders notwithstanding the provisions of their private contract with the corporation, and that the ICC decisionmaking process supplanted state court remedies otherwise available to those stockholders. Here, the contracts in question are creatures of the RLA and have no meaning apart from the rights and obligations the RLA bestows; the RLA prescribes the procedures for creating agreements and the exclusive

[17] *E.g., Missouri Pacific R.R.—Merger—Texas & Pacific Ry.*, 348 I.C.C. 414, 430 (1976), *rev'd on other grounds sub nom. City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977) (assuming *arguendo* that ICC has authority to abrogate contracts, but concluding that ICC's exercise of this power in the circumstances was incorrect), *cert. denied*, 435 U.S. 950 (1978); *St. Louis Southwestern Ry. Lease*, 290 I.C.C. 205, 211-13 (1953).

The Court of Appeals incorrectly suggested, App. 13a, that in *Gulf, Mobile & Ohio R.R.—Abandonment*, 282 I.C.C. 311 (1952), the ICC disclaimed authority, under 49 U.S.C. § 5(11), the predecessor of § 11341(a), to abrogate contracts. The decision was precisely to the contrary. *Gulf, Mobile* was an abandonment case; § 5(11) (like today's § 11341(a)) applied to mergers and consolidations, not abandonments. The ICC held that it could not abrogate contracts in abandonment cases because it could do so "only upon a clear grant of statutory authority similar to that contained in section 5(11)." 282 I.C.C. at 335.

means of enforcing them.[18] Because the statutory exemption "from all other law" applies to purely private contracts, it surely applies to contracts that are themselves constructs of federal law.[19]

Justices Stevens, Brennan, Marshall, and Blackmun, concurring in the judgment in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 287 (1987) (Stevens, J., concurring) ("*ICC v. BLE*"), have already agreed that the power to modify or override labor agreements is encompassed in the § 11341(a) exemption. In *ICC v. BLE*, as here, what was at stake was the claim of certain employees that the "Railway Labor Act . . . and their collective bargaining agreements" gave them the right to perform certain work. 482 U.S. at 295 (Stevens, J., concurring). The concurring Justices would have rejected that claim because of the § 11341(a) exemption.[20]

[18] *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972) (railroad labor agreements are not enforceable in state court); *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 156 (1969) (RLA, 45 U.S.C. § 152 Seventh, "operates to give legal and binding effect to collective agreements"); *Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. 570, 576-78 (1971) (obligation to "maintain" agreements is founded on RLA); *California v. Taylor*, 353 U.S. 553, 561 (1957) (railroad labor agreements supersede state law).

[19] The Court of Appeals did not think "contracts" were encompassed by the phrase "all other law," App. 12a, and went on to express concern that if the ICC's reading of § 11341(a) were correct, the ICC "could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors," App. 13a. In fact, there has been no doubt since 1948 that the ICC does have precisely that power, within the other confines of § 11341(a).

[20] In *ICC v. BLE*, a majority of a panel of the District of

2. The holding of the Court of Appeals breaks with a uniform line of circuit court decisions, beginning with *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), *aff'g* 202 F. Supp. 277 (S.D. Iowa 1962), *cert. denied*, 375 U.S. 819 (1963) ("*BLE v. C&NW*"), which have concluded that the exemptive provision now found in § 11341(a) reaches all rights derived from the RLA, including the right to assert claims based on labor agreements.

In *BLE v. C&NW*, the Eighth Circuit decided, in direct contradiction to the Court of Appeals here, that former § 5(11) exempted a railroad carrying out an ICC-approved transaction from the assertion against it of rights claimed under the RLA, including rights based on collective bargaining agreements. 314 F.2d at 426, 431-33.[21] *Accord Missouri Pacific R.R. v.*

Columbia Circuit had remanded the case to the ICC, directing the agency to make specific findings as to the necessity of an override of RLA-derived rights, including rights assertedly based on labor agreements, in the particular case. *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985). This Court vacated the Court of Appeals' decision on the ground that the appeal of the ICC decision had been untimely and that the Court of Appeals accordingly lacked jurisdiction. The four concurring Justices would have reached the merits of the case; citing *Schwabacher* for its holding that the statutory exemption "from all other law" is self-executing, they concluded that § 11341(a) does not require specific findings as to the necessity of an override of RLA rights, including rights claimed to arise under labor contracts. 482 U.S. at 298. *See also, e.g., Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d 107, 109, 111-12 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987).

[21] In *BLE v. C&NW*, the union had argued that § 5(11) "only purports to relieve the railroad of 'restraints' or 'limitations' or 'prohibitions' of law and does not purport to relieve the railroad

United Transportation Union, 782 F.2d 107, 111-12 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987). All the other circuits to have considered the issue have followed *BLE v. C&NW* in similarly concluding that rights asserted under the RLA are subordinate to the Interstate Commerce Act's exemptive provision. *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Burlington Northern, Inc. v. American Railway Supervisors Association*, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 975 (1975); *Nemitz v. Norfolk & Western Ry.*, 436 F.2d 841, 845-46 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971). In so deciding, none of these courts distinguished between rights claimed under the RLA and those claimed under labor agreements enforceable through that statute. To the contrary, the courts treated these RLA-derived rights as of a piece, never doubting that the exemption "from all other law" immunizes a railroad against all RLA-based challenges to the carrying out of an ICC-approved transaction.[22]

of its contractual obligations"—there, the railroad's asserted obligation to respect seniority rights arising by virtue of certain labor contracts. 202 F. Supp. at 283. The district court, relying, *inter alia*, on *Schwabacher*, rejected the union's arguments. 202 F. Supp. at 284. The Eighth Circuit, though not mentioning *Schwabacher* explicitly, affirmed the district court in all respects. As the Eighth Circuit explained, to hold otherwise "would be to disregard the plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law." 314 F.2d at 431-32.

[22] The circuit courts have reached similar results in cases arising in the airline industry, which is subject to the RLA, even

The ICC has itself long shared in this settled judicial understanding of the reach of the § 11341(a) exemption.[23]

though the statutory scheme governing consolidations in that industry did not contain an exemption provision comparable to § 11341(a). Every court to consider the question held that the RLA, and labor agreements entered into under it, must yield to the Civil Aeronautics Board's authorization of a transaction, subject to employee protective conditions. *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *International Association of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972); *American Airlines, Inc. v. CAB*, 445 F.2d 891, 896-97 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Kent v. CAB*, 204 F.2d 263, 266 (2d Cir.) ("[a] private [labor] contract must yield to the paramount power of the [CAB] to perform its duties under the statute creating it to approve mergers . . . ."), *cert. denied*, 346 U.S. 826 (1953).

[23] *E.g.*, *Denver & Rio Grande Western R.R.—Trackage Rights—Missouri Pacific R.R.*, Finance Docket No. 30,000 (Sub-No. 18), decision served October 25, 1983, slip op. at 6 ("[t]o the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction") ("*DRGW*"), *appeal dismissed sub nom. ICC v. BLE*, 482 U.S. 270 (1987); *see Norfolk & Western Ry.—Merger*, 347 I.C.C. 506 (1974).

The Court of Appeals' decision to remand the question whether § 11341(a) extends to rights asserted under the RLA for further explanation is premised on a misreading of the ICC's precedents. The Court of Appeals mistakenly thought (App. 22a) that the ICC first took the position that § 11341(a) applies to the RLA in 1983, in *DRGW*, and that this position deviated without explanation from the position the ICC had adopted in 1967 in *Southern Ry.—Control—Central of Georgia Ry.*, 331 I.C.C. 151 (1967) ("*Southern Control*"). But neither point is true. The ICC stated unequivocally *in 1974* that "[t]he Railway Labor Act is

The result first reached by the Eighth Circuit, and unquestioned until now, is exactly the one contemplated fifty years ago by this Court in *United States v. Lowden*, 308 U.S. 225 (1939). *Lowden* upheld the ICC's implicit authority to impose labor protection, prior to enactment of the first statutory requirement for such protection, precisely because the Court recognized that the carrying out of a transaction under authority of the Interstate Commerce Act can result in employees' losing rights they previously held under existing labor agreements. 308 U.S. at 233.[24]

a Federal act and is thereby preempted by section 5(11) [now § 11341(a)]." *Norfolk & Western Ry.—Merger*, 347 I.C.C. at 511. Moreover, the Court of Appeals' reading of *Southern Control* ignores that the whole point of that decision was to explain that employees could *not* invoke RLA rights in connection with the carrying out of an approved transaction. 331 I.C.C. at 162-64, 171.

In a decision issued just after the Court of Appeals' decision in this case, the ICC professed to accept the Court of Appeals' instruction that the § 11341(a) exemption does not reach labor agreements. *Brandywine Valley R.R.—Purchase—CSX Transportation, Inc.*, 5 I.C.C.2d 764, 772 n.5 (1989), *appeal docketed*, No. 89-1503 (D.C. Cir. Aug. 21, 1989). Because the Court of Appeals was wrong, the ICC's acquiescence in its holding has no force.

[24] As the *Lowden* Court explained, protective arrangements were justified in significant part because railroad consolidations necessarily result in the abridgment of contract rights:

> [T]he Commission has estimated in its report on unification of the railroads that 75% of the savings will be at the expense of railroad labor. Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads are restricted in their oper-

Moreover, the conclusion that § 11341(a) extends to all RLA-derived rights is precisely the one Congress intended. The legislative record makes it clear that Congress has always understood that the Interstate Commerce Act's exemption provision will cause both the RLA and agreements negotiated under that statute to yield to the carrying out of an approved transaction. In our case, the Court of Appeals thought there was no pertinent legislative history of the Interstate Commerce Act after the Transportation Act of 1920, where the exemption provision originated, and mistakenly ended its analysis with that Act. App. 18a-19a.[25] In fact, developments since the 1920 Act provide conclusive evidence that Congress expected the exemption provision to reach labor agreements.

The Emergency Railroad Transportation Act of 1933 ("ERTA") is perhaps most revealing. Title I of

> ation to those members of groups who are employed at specified points or divisions. It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation . . . .

308 U.S. at 233 (footnote omitted).

[25] The Court of Appeals was clearly wrong in proceeding (App. 17a-18a) as though § 11341(a) is cabined by the particular circumstances that Congress confronted in 1920. *See McLean Trucking Co. v. United States*, 321 U.S. 67, 78-79 (1944) (expansive language of § 5(11) refutes contention that, because motor carriers faced less severe economic circumstances in 1935 than did railroads in 1920, scope of § 5(11) is narrower for motor carriers than for railroads).

ERTA was *temporary* legislation of ultimately three years duration. Responding to the extraordinary circumstances created by the Depression, Congress expressly excluded the RLA and labor agreements from the exemption provision found in Title I.[26] At the same time, Congress did *not* carve out a special exception for the RLA or labor agreements from the exemption provision contained in the *permanent* Title II of ERTA, which was codified as 49 U.S.C. § 5(15), a forerunner of § 11341(a). Differences between Title I and Title II of ERTA "indicate an intentional distinction." *Texas v. United States*, 292 U.S. 522, 534 (1934) (contrasting unqualified exemption provision in § 5(15) of Title II with provision in Title I expressly guaranteeing that carriers would not be relieved from contractual agreements to keep offices in particular locations).

Congress reaffirmed its purpose in the Transportation Act of 1940, reenacting the exemption provision (as 49 U.S.C. § 5(11)) without any exception for the RLA or labor agreements.[27] Section 5(11) was

[26] Section 10(a) of ERTA Title I contained an exemption from other law similar to that found in the Transportation Act of 1920 (then 49 U.S.C. § 5(8)), to which Congress added the following:

> nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.

48 Stat. at 215. Plainly, there would have been no need for this specific limitation if the exemption provision, by its terms, did not reach RLA-derived rights in the first place.

[27] The 1940 Act also provided "additional proof" of Congress'

recodified in 1978 as § 11341(a), without substantive change.

A similar purpose is found in the legislative history of the employee protective conditions—in particular, in Congress' rejection, in enacting the predecessor to 49 U.S.C. § 11347 as part of the Transportation Act of 1940, of a proposal known as the Harrington amendment. That proposal would have permitted consolidations to occur only if all rights under the RLA and labor agreements were preserved; it "threatened to prevent all consolidations." *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 151 (1950).[28] As the Eighth Circuit recognized in *BLE v. C&NW*, to exclude RLA-derived rights from the reach of the § 11341(a) exemption would produce the

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intent to grant the ICC an adequate immunity power, by making the ICC's jurisdiction over transactions "exclusive and plenary." *Seaboard Airline R.R. v. Daniel*, 333 U.S. 118, 125 (1948).

[28] The Harrington amendment would have barred the ICC from approving any transaction that would "result in unemployment or displacement of employees of the carrier or carriers, or *in the impairment of existing employment rights* of said employees." 84 Cong. Rec. 9882 (1939) (emphasis added). Instead, Congress enacted what became 49 U.S.C. § 5(2)(f), the predecessor to § 11347, requiring the ICC, in approving a transaction, to provide a "fair and equitable arrangement to protect the interests of the [affected] employees." The defeat of the Harrington amendment confirmed Congress' intent to permit railroads to carry out approved transactions that cause changes in existing labor agreements, but to ensure that affected employees receive fair compensation under the ICC's protective conditions. *See Railway Labor Executives' Association v. United States*, 339 U.S. 142, 147-54 (1950); *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37, 42 (1971).

very result Congress rejected in defeating the Harrington amendment. 314 F.2d at 430-31.[29]

The crabbed reading of § 11341(a) adopted by the Court of Appeals wrongly and inexplicably leaves transactions approved by the ICC vulnerable to defeat

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[29] Here, the Court of Appeals not only ignored dispositive legislative history, but misunderstood the legislative history it did review. Thus, the court mistakenly relied on Congress' rejection, in 1926, of a proposed amendment to the bill *that became the RLA* that would have permitted the ICC to suspend wage agreements it believed were not in the public interest.

The Court of Appeals found in language quoted from a 1926 Senate Report—" 'there was a fundamental objection to making changes of a substantive nature in the agreement which the parties had reached' "—specific evidence of congressional hostility to ICC interference with negotiated wage agreements. App. 18a. But the quoted passage in fact did not address the proposed amendment to the RLA bill. The "agreement" to which the Senate Report referred was not a negotiated wage agreement (or such agreements in general), but, rather, the overall agreement between management and labor *as to what the RLA as a whole should say*. The quoted passage simply affirmed that the new RLA should ratify, and not change the terms of, the national legislative compact between management and labor. S. Rep. No. 606, 69th Cong., 1st Sess. 6 (1926), *reprinted in* 1 *Railway Labor Act of 1926, Legislative History* at 100, 105 (M. Campbell & E. Brewer, III, eds. 1988).

What the Senate Report actually said about the proposed amendment to the RLA bill was that it would embroil the ICC in a "field of controversy" and thereby impair the ICC's effectiveness. *Id.* In any event, the proposed amendment was *not* related to the ICC's jurisdiction over transactions, but would have given the ICC a roving commission to suspend wage agreements generally. The amendment's rejection provides no evidence that Congress intended (either prior to or after 1926) to withhold from the ICC the authority to change labor agreements when necessary to the carrying out of an approved transaction.

through the assertion of RLA-derived rights, in direct disregard of clear legislative intent and what, until now, has been the uniform understanding of the courts.

3. This Court should review and reverse the decision of the Court of Appeals now, without awaiting the results of the ICC remand proceeding and further action by the Court of Appeals. The holding of the Court of Appeals is self-contained and plainly wrong. It is already having an enormous adverse impact on the railroad industry.

The decision's erroneous holding as to the reach of the § 11341(a) exemption is reverberating through the courts of appeals. Another panel of the Court of Appeals has cited the holding as a proper statement of the law. *Railway Labor Executives' Association v. ICC*, 883 F.2d 1079, 1082 (D.C. Cir. 1989).[30] Moreover, notwithstanding its own prior decisions holding that the § 11341(a) exemption applies to RLA-derived rights, including the right to assert claims based on labor agreements, the Eighth Circuit has relied on the Court of Appeals' decision as authority for the proposition that the ICC lacks the power to override the provisions of a labor agreement. *Brotherhood of Locomotive Engineers v. ICC*, 885 F.2d 446, 449-50 (8th Cir. 1989).

This Court's eventual consideration of the Court of Appeals' July 25, 1989 decision will not be assisted by the outcome of the remand proceeding that is now in progress at the ICC. That proceeding, limited by the "law of the case" established by the Court of

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[30] Under 28 U.S.C. § 2343, all ICC decisions may be reviewed in the District of Columbia Circuit.

Appeals, offers at best the promise that the ICC will articulate an artificially narrow conception of its Interstate Commerce Act powers. Although the ICC can support its actions in our case without relying on the § 11341(a) exemption as the source of authority to override agreements, it defies history, the uniform case law, and decades of clear congressional intent for the agency to have to do so; and the analysis that the ICC must necessarily put forth in order to do so will be incomplete. Moreover, this Court will not benefit from the Court of Appeals' own review of the ICC's remand decision, as that review will necessarily be conducted on a foundation consisting of the court's already-established erroneous reading of § 11341(a).[31]

The ICC itself has acquiesced in the Court of Appeals' § 11341(a) holding and is handling other cases under the cloud of that acquiescence. See pages 18-19, n.23, above. If this Court does not reverse the Court of Appeals now, the ICC will continue to impose an incorrect, restrictive limitation on the reach of its own power. Parties to pending and future railroad transactions will be forced to make innumerable business decisions shaped by the knowledge that the ICC is applying the incorrect rule. This problem is severe; to the extent that the Court of Appeals' decision dictates unquestioned adherence to existing labor agreements, it threatens to prevent future railroad consolidations, in violation of the national transpor-

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[31] This point is brought home by the Court of Appeals' own suggestion that its holding as to the reach of the § 11341(a) exemption may leave little for the ICC to consider on remand. App. 23a-25a.

tation policy and in derogation of the proper adjudicative role of the ICC.

Finally, the Court of Appeals' decision destabilizes ordinary day-to-day dealings between labor and management in the railroad industry. As happened in this case, railroads frequently conduct coordinations of work under authority of decisions previously rendered in ICC merger and control proceedings, subject to the protective conditions already imposed by the ICC in those proceedings; in connection with such coordinations, the railroads negotiate (and, when necessary, arbitrate) implementing agreements with their unions on an ongoing basis, without returning to the ICC at all unless an arbitration award is appealed. Because the Court of Appeals' decision rejects the settled understanding of the working and effect of the ICC approval process, it promises to stifle the continuing implementation of already-approved railroad consolidations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 28, 1989

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 25, 1989 Decided July 25, 1989

No. 88-1724

BROTHERHOOD OF RAILWAY CARMEN, et al., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

CSX TRANSPORTATION, INC., INTERVENOR

No. 88-1694

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and the
UNITED STATES OF AMERICA, RESPONDENTS

NORFOLK & WESTERN RAILWAY CO. and
SOUTHERN RAILWAY CO., INTERVENORS

Petitions for Review of Orders of the
Interstate Commerce Commission

William G. Mahoney, with whom *John O'B. Clarke, Jr.* was on the brief, for petitioners.

John J. McCarthy, Jr., General Counsel, Interstate Commerce Commission, with whom *Robert S. Burk*, General Counsel, and *Henri F. Rush*, Deputy General Counsel, Interstate Commerce Commission, were on the brief, for respondent. *Robert J. Wiggers* and *John J. Powers, III*, Attorneys, Department of Justice, also entered appearances for respondent.

James S. Whitehead, for intervenor in No. 88-1724.

Jeffrey S. Berlin, with whom *Mark E. Martin, Amy R. Doberman* and *William P. Stallsmith, Jr.*, were on the brief, for intervenors in No. 88-1694.

Before: WALD, *Chief Judge*, and EDWARDS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: The Brotherhood of Railway Carmen and the American Train Dispatchers' Association petition for review of orders of the Interstate Commerce Commission issued in separate proceedings before that agency. We dispose of the two cases together because they raise common issues with respect to the ICC's authority to exempt a party to a merger between railway carriers subject to approval under § 11344 of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (the Act), from the provisions of (1) a Collective Bargaining Agreement (CBA); and (2) the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

Because we conclude that the ICC has misperceived, in one important respect, the scope of its exemptive power, we grant each petition for review in part, and remand the cases to the ICC for further proceedings.

I. FACTUAL BACKGROUND

The operative facts of the two transactions here at issue, and the background of the respective administrative proceedings, are as follows:

A. *The Carmen's Case*

In 1980, the ICC approved a proposal under which CSX Corporation, a newly-formed holding company, would acquire control of two other holding companies: (1) the Chessie System, Inc., the principal railroad subsidiaries of which were the Chesapeake and Ohio Railway Company (C&O) and the Baltimore and Ohio Railroad Company; and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Line Railroad (Seaboard) (later to become CSX Transportation, Inc., or CSX). *CSX Corporation—Control—Chessie System, Inc., and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980) (*CSX Control*).

In its order approving the transaction, the ICC imposed upon the parties a standard set of labor-protective conditions, as required by § 11347 of the Act, 49 U.S.C. § 11347. *CSX Control*, 363 I.C.C. at 588-92, 604. As usual in merger cases, the applicable conditions were transplanted from the ICC's decision in *New York Dock*, 360 I.C.C. 60, 84-90 (1979), *aff'd*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). Section 4 of the *New York Dock* conditions establishes procedures for the resolution—by means of negotiation and, failing that, binding arbitration—of any labor dispute arising from an ICC-approved railroad consolidation. Accordingly, § 4 requires a "railroad contemplating a transaction which . . . may cause the dismissal or displacement of any employees, or rearrangement of forces [to] give at least ninety . . . days written notice . . . ." Section 2 is a status quo provision:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and

benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements.

In 1986, CSX, invoking § 4 of the *New York Dock* conditions, notified the labor organizations representing its employees that it intended to close its freight car repair shop at Waycross, Georgia, and to transfer the work performed there to the C&O repair shop at Raceland, Kentucky, and that the transfer would result in a net decrease in available jobs at the two shops. The Brotherhood then attempted, on behalf of certain CSX employees who would be affected by the transfer, to negotiate an agreement governing the labor-related changes that the Waycross-Raceland consolidation would require.

Relations between the Brotherhood (and other unions) and CSX were governed by a CBA—known as the "Orange Book"—that they had negotiated in connection with the 1967 merger that created Seaboard; CSX and the Brotherhood continued to observe these terms after the 1980 *CSX Control* transaction. The Orange Book provides, with exceptions not here relevant, that the carrier will employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." In consideration for this job protection, the Orange Book gives the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated [i.e., Seaboard] system . . . ."

The negotiations between CSX and the Brotherhood failed due to disagreements as to (1) whether displaced Waycross employees would retain their Orange Book right to lifetime income; and (2) whether (a) the Waycross-Raceland consolidation would result in a change in

working conditions, and, if so, (b) CSX would be required to comply with the terms of § 6 of the RLA, 45 U.S.C. § 156, and thus to bargain before effecting the change. The Brotherhood then invoked the mandatory arbitration provision of the *New York Dock* conditions, but shortly thereafter, reversed its position and claimed that because the shop consolidation was not contemplated by the *CSX Control* transaction, the *New York Dock* conditions were not applicable at all. By then, however, CSX had invoked arbitration under the *New York Dock* conditions, and the matter came before a three-member arbitration panel (the *Carmen* Committee), with the Brotherhood participating under protest.

In the proceedings before the Committee, it became clear that CSX sought not only to transfer *work* from Waycross to Raceland and to reduce the total number of positions, but also (1) to transfer certain Waycross *employees* to employment by the C&O in Raceland and (2) to remove them from the protection of the Orange Book to coverage under the CBA between the C&O and the Union, which apparently does not contain a lifetime income clause. The Committee held that the Orange Book prohibited CSX from transferring either work or employees outside the Seaboard system created by the 1967 merger. The ICC did not pass upon that determination, but CSX, which has intervened in this appeal, does not dispute it.

The Committee then held, however, that (1) it had the power, "[a]s a quasi-judicial extension of the ICC" to abrogate provisions of a CBA, and to relieve CSX from any requirement of the RLA, that stood in the way of an operational change, such as the shop transfer, that was "authorized or required" by—though not specifically referenced in—the *CSX Control* decision approving the 1980 merger; and (2) it would (a) abrogate the Orange Book prohibition on the transfer of work, but not on the transfer of employees, outside the old Seaboard system,

and (b) exempt CSX from the RLA insofar as it might require the carrier to bargain before unilaterally changing the Orange Book with respect to the work transfer.

The ICC upheld the Committee in other respects, but reversed the Committee's decision not to abrogate the Orange Book prohibition on the transfer of employees as well as work. The ICC further held that, to the extent that switching CSX employees from the Orange Book to the CBA at Raceland would deprive them of their right to income for life, that right would be abrogated. It did not pass upon the question whether the Orange Book did in fact prohibit the transfer of either work or employees but assumed as much.

In its petition for review, the Brotherhood challenges the ICC's authority under the Act to override provisions of the Orange Book and of the RLA. It also claims that the ICC's decision, insofar as it overrides the Orange Book, violates the Compensation Clause of the Fifth Amendment to the Constitution. Finally, it challenges the standard of review that the ICC applied in reversing the Committee's ruling against employee transfers.

B. *The Dispatchers' Case*

In March 1982, the ICC approved the application of NWS Enterprises, Inc. (now Norfolk Southern, or NS), a holding company, to acquire control of two previously separate carriers—the Norfolk and Western Railway Company (N&W) and the Southern Railway Company (Southern). *Norfolk Southern Corp.—Control—Norfolk & Western Ry. Co.*, 366 I.C.C. 173 (1982) (*NS Control*). As in *The Carmen's Case*, the ICC imposed upon the parties to the transaction the standard *New York Dock* conditions. *Id.* at 231.

The American Train Dispatchers' Association was the bargaining representative of certain N&W employees responsible for power distribution. In September 1986, N&W and Southern informed the Association that they intended "to coordinate certain [N&W] work performed in the System Operations Center . . . in Roanoke, Virginia into the [Southern] Control Center in Atlanta, Georgia," and in so doing, to abolish several supervisory positions at Roanoke. The carriers proposed an implementing agreement whereby the affected N&W supervisors would be "given consideration" for employment in new positions as Superintendents in Atlanta. Superintendents there were considered management employees, however, and were not covered by any CBA.

Attempts to negotiate an implementing agreement foundered over the Association's contentions that (1) the carriers' proposal was subject to mandatory bargaining under the RLA; (2) the carriers were required to preserve the right of the transferred employees to representation under RLA § 2, *Fourth*, 45 U.S.C. § 152, *Fourth*; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the CBA with N&W. The carriers then asked the National Mediation Board to appoint an arbitrator pursuant to the *New York Dock* conditions. As in *The Carmen's Case*, the dispute came before a three-member arbitration committee (the *Dispatchers'* Committee), which ruled in favor of the carriers on each of the disputed issues.

The rationale of the *Dispatchers'* Committee with respect to the CBA and the RLA was essentially the same as that of the *Carmen* Committee. It concluded that (1) it had the power to abrogate any CBA or RLA provision that impeded implementation of the ICC-approved merger of the N&W and the Southern; (2) the transfer of distribution functions, though not specifically considered in the *NS Control* case, was part of the control transaction; and (3) apparently because application of the N&W CBA to Superintendents at Southern would impede the transfer, transferred employees could not retain their rights under that CBA.

On June 6, 1987, after the ICC had denied the Association's application for a stay of the Committee's award, the carriers effected the work transfer authorized thereby. On June 10, 1988, the ICC affirmed the Committee in all respects, stating, in particular, that the Committee's third ruling was supported by the record insofar as "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function." The ICC also rejected the Association's claim that the transfer would deprive the employees of their right to representation under Section 2, *Fourth* of the RLA, reasoning that "[the Association's] rights as an incumbent bargaining representative are for determination by the National Mediation Board."

In its petition for review, the Association maintains that the ICC lacks authority under the Act to relieve the carrier of its obligation under the RLA and its CBA, and that its decision depriving the employees of their rights under the CBA violates the Compensation Clause of the Fifth Amendment.

II. Legal Background

Before taking up the merits of this dispute, we discuss briefly the relevant statutory framework, the agency's position below, and its claim to *Chevron* deference for that position in this court.

A. *Statutory Background*

Sections 11341 and 11344 of the Act require that the parties to certain transactions listed in § 11343, including carriers proposing to merge, first get ICC approval. 49 U.S.C. §§ 11341, 11343, 11344(a), (c). Under § 11344(c), the ICC must approve any such proposal "when it finds the transaction is consistent with the public interest." As noted earlier, § 11347 requires that

it also impose upon the merging carriers certain labor protective conditions; and it generally meets this requirement by imposing the *New York Dock* conditions described above.

Section 11341(a) provides that upon ICC approval of a § 11343 transaction:

> A carrier . . . participating in that approved . . . transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11341(a). This is the so-called immunity provision at the center of this case.

B. *The Agency's Position*

In its decisions in these cases, the ICC asserted that it has the power, which devolves upon an arbitration committee convened under § 4 of the *New York Dock* conditions, to relieve a party to a § 11343 transaction from any provision of a CBA or of the RLA that stands in the way of implementing that transaction. Its rationale for this assertion was less than clear, however, due largely to its failure to analyze separately the statutory provisions upon which it relied and their relation to the specific rights it purported to abrogate.

1. *Collective Bargaining Agreements*

The ICC appears to have relied upon two bases for its claim that it may abrogate the provisions of a CBA. First, it cited the immunity provision, § 11341(a), stating that it empowered an arbitrator appointed under the *New York Dock* conditions "to override existing agreements by requiring the work and employees to be moved . . . ." *Carmen*, Joint Appendix (J.A.) 204; *id.*

at 207 (Committee correctly understood ICC's view to be that § 11341(a) overcomes "all legal obstacles preventing implementation" of an approved § 11343 transaction); *accord Dispatchers*, J.A. 290-91. As both Committees noted, the ICC had come to this position only recently, in *Denver and Rio Grande Western R.R. Co.—Trackage Rights—Missouri Pacific R.R. Co.*, Finance Docket 30,000, served Oct. 25, 1983 (*DRGW*), *rev'd sub nom Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270 (1987). *Cf. Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 170 (1967) (immunity provision does not relieve carrier from CBA limitation on transfer of employees).

In *The Carmen's Case*, the ICC appeared also to rely upon § 4 of the *New York Dock* conditions, which it read as supporting the Committee's ruling that it had "the absolute authority . . . to effect changes in work and employee assignments," notwithstanding any CBA provision to the contrary. J.A. 207.

The ICC renews each of these theories on appeal.

2. *The Railway Labor Act*

The ICC also appears to have advanced two sources for its power to override the RLA. First, it stated that the immunity provision exempts the parties to an approved § 11343 transaction from any RLA procedure that might impede the effectuation of the transaction. *Carmen*, J.A. 204-05, 207 (recounting, and apparently approving, the Committee's conclusion "that, under the immunity provisions of [§] 11341(a), implementation of transactions that we authorize under [§] 11343, such as *CSX Control*, supersede employee protections under the RLA"); *accord Dispatchers*, J.A. 290. The ICC had reached similar conclusions in *DRGW*, *supra*, and in *Union Pacific Corp.; Union Pacific R.R. Co. and Missouri Pacific R.R. Co.—Control—Missouri-Kansas-Texas R.R. Co., et al.*,

4 I.C.C. 2d 409, 514 (1988), a petition for review of which is currently pending before this court, *see Railway Labor Executives Ass'n v. ICC*, No. 88-1391 (argued April 28, 1989).

Second, the ICC stated that "[t]he mandatory arbitration provisions of *New York Dock* take precedence over the RLA dispute resolution procedures in transactions approved by this Commission . . . ." *Dispatchers* J.A. 289; *accord Carmen*, J.A. 204. As we read it, the ICC's position was that when Congress enacted the current version of § 11347, which incorporates by reference a set of dispute resolution procedures culminating in mandatory arbitration, it intended those procedures to be exclusive where they applied. Although it nowhere expressly abandons this theory, the ICC does not argue it in this court; it relies solely upon its § 11341(a) theory.

C. *Chevron Deference*

The ICC argues that its interpretation of the relevant provisions of the Act is entitled to deference under the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and that we should therefore uphold that interpretation as long as it is reasonable. We agree that *Chevron* applies to the ICC's reading of the statute that it is charged with implementing. *Chevron* establishes, however, two steps for judicial review of an agency's interpretation of law: we do not proceed to the question whether the agency's interpretation is permissible, and thus entitled to deference, unless we have first determined, based upon the language of the statute and the "traditional tools of statutory construction," *id.* at 843 n.9, that Congress has not "directly spoken to the precise question at issue . . .; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. We strike out first in search of

Congress's intent in enacting the immunity provision of the Act.

III. Analysis

"In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K-Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988). We begin, as always, with the relevant portion of the statute (§ 11341(a)):

> . . . A carrier or corporation participating in or resulting from a transaction approval by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control of franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is *exempt from the antitrust laws and from all other law, including State and municipal law*, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

A. *Collective Bargaining Agreements*

We cannot sustain the ICC's position that this provision empowers it to override a CBA. First, and most important, the ICC's position finds no support in the language of the statute. By its terms, § 11341(a) contemplates exemption only from "the antitrust laws and from all other law" to the extent necessary to carry out the transaction. Nowhere does it say that the ICC may also override contracts, nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to "contracts," much less any specific reference to CBAs. Nor has the ICC explained how we can read the term "other law," as it has done, to mean "all legal obstacles." *Dispatchers*, J.A. 207. None of the Supreme Court decisions, discussed

below, authorizing the ICC to abrogate an "other law" even suggests that the term means "all legal obstacles." The ICC itself, prior to its 1983 decision in *DRGW*, recognized as much. *See Gulf, Mobile & Ohio R.R. Co.—Abandonment*, 282 I.C.C. 311, 335 (1952) ("None of the decisions in the [Supreme Court] cases . . . relates to private contractual rights, but refers [sic] to State laws which prohibit in some way the carrying out of the transaction authorized.").

Moreover, the ICC's proposed insertion of "all legal obstacles" into the statutory language would lead to most bizarre results. Under the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors. *Cf. Gulf, Mobile & Ohio*, 282 I.C.C. at 331-35 (declaring itself without power, in an abandonment context, to relieve a carrier from its "contractual obligations for the payment of rent"). We do not think it likely that Congress would grant the ICC a power with so much potential to destabilize the railroad industry; we are confident, however, that it would not do so without so much as a word to that effect in the statute itself. Never, either in its decisions here under review or in prior cases, has the ICC offered any justification for this most unlikely reading of the Act.

Perhaps we could tolerate the ICC's reading if it found strong support in either the "design of the statute as a whole," *K Mart*, 108 S.Ct. at 1817, or in its legislative history. We find nothing there upon which to sustain it, however; if anything, both tend to support the meaning conveyed by the words of the statute itself.

Congress first introduced the immunity provision, in a somewhat different form, in 1920. Transportation Act, 1920, 66th Cong., 41 Stat. 456, 482 (1920) (amending § 5 of the Act) (1920 Act) § 407. In the 1920 Act,

Congress deputized the ICC to design a master plan to consolidate the nation's railroads into a limited number of strong systems; the plan was to be implemented by voluntary action on the part of the carriers. 41 Stat. 481 (§§ 5(4), 5(6), *See generally Schwabacher v. United States*, 334 U.S. 182, 191-93 (1948). It also, for the first time, gave the ICC exclusive jurisdiction to approve railroad consolidations; the agency was directed to approve any proposed consolidation that it found to be consistent with (1) its master plan; and (2) the public interest. (Congress removed the first criterion when, in 1940, it discarded the idea of a master plan. *See id.* at 193.)

The immunity provision of the 1920 Act provided that:

> The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and *they are hereby, relieved from the operation of the "antitrust laws," . . . and of all other restraints or prohibitions by law, State or Federal,* in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

41 Stat. 482 (§ 5(8) (emphasis added)).

It is reasonably clear from the history of the 1920 Act what Congress intended the immunity provision to accomplish. In 1917, President Wilson, in the exercise of his wartime powers, had taken possession of the railroads, in part to consolidate them into a unified transportation system in aid of the national defense. *See* Priorities Act, 65th Cong., 40 Stat. 272 (1917); Federal Control Act, 65th Cong., 40 Stat. 451 (1918). *See generally 32d Annual Report of the Interstate Commerce Commission* (1918) (*1918 Annual Report*) at 1-2. Prior to that time, the ICC's authority over the railroads was relatively limited; the States, on the other hand—through

their ratemaking commissions, their corporation laws, and their police powers—intensively regulated the carriers' rates, finances, and operations. Whereas state regulation had at first severely hampered efforts to enlist the railroads in the war efforts, *Schwabacher*, 334 U.S. at 191, during the period of nationalization, neither state nor federal law stood in the way of the Government's purpose to further the war effort.

In 1920, when the period of federal control was about to end, Congress thought it imperative to the transportation needs of the nation that a program of coordination and consolidation be continued; this it chose to pursue, in part, by facilitating voluntary consolidations in accordance with the master plan the ICC was to develop. *Id.* at 191-94. *See* H. Rep. No. 456, 66th Cong. at 6-7, 18-19 (1919); H. Rep. No. 650, 66th Cong. at 643-64 (1920). *See generally* I.L. Sharfman, *The Interstate Commerce Commission* 153-70, 183 (1931). The carriers' return to private ownership, however, would bring with it two complications.

First, they would be again subject to regulation by the uncoordinated and often unfriendly state commissions and legislatures. As the Supreme Court stated in *Transit Commission v. United States*, 289 U.S. 121, 127 (1933):

> . . . Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for.

See also Texas v. United States, 292 U.S. 522, 530-31, 534-35 (1933) (in order "to insure an adequate transportation system" Congress gave the ICC power "to au-

thorize consolidations, purchases, leases, operating contracts, and acquisition of control," to the exclusion of state laws that would burden the ICC's master plan).

Second, they would be newly subject to regulation by the recently invigorated antitrust laws of the federal Government itself; the Supreme Court had recently held that § 1 of the Sherman Act made unlawful any merger between carriers that eliminated competition to even a limited extent. *See United States v. Union Pacific R.R. Co.*, 226 U.S. 61, 88-89 (1912).

Congress addressed both of these problems with the immunity provision of the 1920 Act. First, Congress placed in the ICC, and removed from the antitrust courts, the duty of considering the anticompetitive effects of any merger proposed to it. 41 Stat. 481 (§ 5(4)) (ICC master plant to preserve competition "as fully as possible"); *McLean Trucking Co. v. United States*, 321 U.S. 67, 73-78 (1944). Second, Congress continued its wartime policy to centralize supervision of the nation's railroads and to eliminate conflicting state authority; thus, for example, ICC-approved consolidations could go forward, aided by the immunity provision, free of interference by the States. This general, centralizing sentiment was echoed in other sections of the 1920 Act, which gave the ICC authority, notwithstanding contrary state law, to (1) approve any extension, construction, or abandonment of tracks, *see* 41 Stat. 477-78 (§§ 1(18), 1(20)); *Transit Commission*, 289 U.S. at 126-28; (2) reject or permit any proposed issuance of securities, 41 Stat. 494-95 (§§ 20a(2), 20a(7)); and (3) adjust rates it deemed unduly preferential or discriminatory, *id.* at 484 (§ 13 (4)).

The ICC applied the immunity provision of the 1920 Act to exempt merging carriers from a wide variety of state law impediments. *See, e.g., Clinchfield Ry. Lease*, 90 I.C.C. 113, 134 (1924) (constitutional bar to foreign

corporation operating railroad in state); *Control and Operation of Louisiana & Arkansas Ry. Co.*, 150 I.C.C. 477, 487 (1929) (law forbidding consolidation, stock ownership, or lease of parallel or competing lines); *Control of San Antonio & Arkansas Pass Ry. by Southern Pacific Co.*, 94 I.C.C. 701, 704 (1925) (local corporate headquarters requirement); *Lease of Louisville, Henderson & St. Louis Ry. by Louisville & Nashville R.R. Co.*, 150 I.C.C. 741, 743-44 (1929) (law giving minority stockholders appraisal rights prior to sale of corporate property). And the Supreme Court consistently upheld its application. *See, e.g., Seaboard Air Line R.R. Co. v. Daniel*, 333 U.S. 118, 124-27 (1948) (local incorporation law); *Texas v. United States*, 292 U.S. at 531-35 (local corporate headquarters).

Thus, in the 1920 Act, Congress "made a new departure," *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R.R. Co.*, 257 U.S. 563, 585 (1922), pressing for consolidation of the nation's railroads in a legal environment that had long been hostile to such a notion. When, upon the recommendation of the ICC, *see Extension of Tenure of Government Control of the Railroads: Hearings Before the Committee on Interstate Commerce, United States Senate on the Extension of Time for Relinquishment by the Government of Railroads to Corporate Ownership and Control*, 65th Cong., Vol. 1 at 231-305, 339-377 (1919) (remarks of ICC Commissioner Edgar E. Clark); *Return of the Railroads to Private Control: Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 4378*, 66th Cong. at 8-139, 2857-2966 (1919) (same), it enacted into law a voluntary consolidation/immunity program—which the ICC had originally advocated in 1917, *see Report of the ICC to the Senate and House of Representatives*, 56 Cong. Rec. 45, 65th Cong., H. Doc. 503 (Dec. 5, 1917) (reprinted in *1918 Annual Report* at 5-7)—it clearly meant to change that legal environment.

From our review of this history, we are confident that Congress did not intend, when it enacted the immunity provision, to override contracts. First, Congress focused nearly exclusively, in the hearings and debates on the 1920 Act, on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract. *Cf. Association of Flight Attendants v. Delta Air Lines, Inc.*, No. 87-7040, slip op. at 23 (D.C. Cir. July 18, 1989). Indeed, Commissioner Clark, who presented the immunity idea to the House and Senate Commerce Committees in the hearings cited above, did not once suggest, over the course of several days and several hundred pages, that the proposed immunity might relieve a carrier of its obligations under negotiated agreements with third parties.

Moreover, in the legislative debates both on the 1920 Act and in 1926, when in the RLA it provided a framework for the regulation and enforcement of CBAs in the railroad industry, Congress exhibited a healthy respect for privately negotiated contracts; it rejected, for example, an amendment to the RLA that would have granted the ICC the power to suspend excessively generous wage agreements between carriers and their employees, in part on the ground that legislation abrogating labor agreements would be unconstitutional, *see* 67 Cong. Rec. 8884-86, 8892-93, 8896-97, 9190-91, 9196-97 (1926), and in part on the grounds that "there was a fundamental objection to making changes of a substantive nature in the agreement which the parties had reached," and that "[i]f agreement is to be resorted to [as a means of resolving labor management disputes], . . . the agreement should not be destroyed by placing in the act provisions which would have that effect." S. Rep. No. 606, 69th Cong. at 5-6 (1926). And never, on the several occasions when Congress has revisited the immunity provision, has it either broadened that provision so as to reach "all legal obstacles" to an ICC-approved transaction, or acted more specifically to bring "contracts" or

"collective bargaining agreements" within the reach of the statute.

Against this history as background, we can not impute to Congress the intention to make the bargained-for provisions of a CBA contingent upon their not later becoming inconvenient to the full realization of operating economies that a merger might make possible. *Cf. Association of Flight Attendants*, *supra*, slip op. at 23. We recognize that other forces may operate to abrogate a CBA in the post-merger context, as, for example, when the NMB, pursuant to its power under § 2, *Ninth* of the RLA, 45 U.S.C. § 152, *Ninth*, decertifies a union following an operational merger. *See, e.g.*, *International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir. 1983). We simply do not think that Congress has lodged any such power in the ICC, particularly where, as in each of these cases, the CBAs at issue survived the ICC-approved merger and were not, apparently, questioned by the parties thereto until the present disputes arose—several years after the merger.

B. *The Railway Labor Act.*

At least one court of appeals has held that the immunity provision of the Act may operate to override provisions of the RLA. *Brotherhood of Locomotive Engineers v. Chicago & Northwest Ry. Co.*, 314 F.2d 424, 431-32 (8th Cir. 1963). We decline to address the question here, however, for two reasons.

First. The Unions question whether the ICC has the power to apply the immunity provision at all. They note that § 11341(a) is in terms "self-executing," which we take to mean that its effect is not to be determined by the ICC when it passes upon a transaction, but rather by the appropriate tribunal for the resolution of a particular case in which it is invoked by a carrier as a defense to the application of some "other law." They draw

support for this position from two footnotes in Justice Stevens's concurring opinion in *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 300 nn. 13 & 14 (1987), in which the four Justices to reach the merits so opined.

It is true that the ICC has in the past itself taken this position. *See Chicago, St. Paul, Minneapolis & Omaha Ry. Co. Lease*, 295 I.C.C. 696, 702 (1958) (nothing in the Act "authorizes us to determine and declare the particular laws within the scope of [the immunity provision] from which a carrier shall be relieved. The terms of [the provision] are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do. Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act . . . .") (citation omitted).

The ICC's statement in *Chicago, St. Paul* is correct to the extent that it means that the Commission is not *required* to determine what the effect of the immunity provision will be; the Supreme Court has long so held. *New York Central Securities Corp. v. United States*, 287 U.S. 12, 26-27 (1932); *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 391 (1922). The Court has also held, however, contrary to the implication of the first-quoted sentence from *Chicago, St. Paul*, that the ICC is *authorized* to make a determination, in approving a transaction, that laws standing in the way of its implementation must give way. *See Seaboard*, 333 U.S. at 124-27; *Texas v. United States*, 292 U.S. at 531-35; *Schwabacher*, 334 U.S. 182. *See also Gulf, Mobile & Ohio R.R. Co. Abandonment*, 282 I.C.C. 311, 335 (1952) (reading above cases as giving it the authority to set aside "State laws which prohibit in some way the carrying out of the transaction authorized"). Thus, we must reject the Unions' argument that the ICC lacks any power to consider a question of exemption that is properly presented to it.

Although the ICC's disclaimer of power in *Chicago, St. Paul* is overbroad insofar as it suggests that the ICC never has the power to determine a particular question of exemption, the result there can be reconciled with the Supreme Court cases cited above. In each of those cases the question of exemption arose before the consummation of the approved transaction; the issue was whether the ICC could, in the course of its approval of the transaction, remove a state law barrier to its effectuation. *See Schwabacher*, 334 U.S. at 200-01 (ICC may override state law granting dissenting stockholders right to block merger); *Seaboard*, 333 U.S. at 121; *Texas v. United States*, 292 U.S. at 531-32. As the Unions correctly note, *Chicago, St. Paul*—like the cases now before us—involved a carrier's request, submitted well after the consummation of the ICC-approved transaction, for exemption from the RLA. The ICC declined the carrier's request, saying:

> It is apparent that the [RLA] has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease by North Western of the lines of railroad and other properties owned, used, or operated by the Omaha, and this has been accomplished. The order did not provide any particular method for integration of the physical operations involved, and, except for the imposition of . . . conditions for the protection of employees, did not deal with employer-employee relationships.

295 I.C.C. at 702.

The ICC's broader disclaimer of any power to declare a carrier exempt from a law can thus be understood in the context in which it was presented; as the ICC interpreted the Act in 1958, it was without power to revisit an approved and successfully consummated transaction merely in order to relieve the merged carrier, after the fact, from the burden of complying with the RLA.

Even so understood, however, the ICC's holding in *Chicago, St. Paul* is still inconsistent with its current position; the transactions here at issue had long since been consummated when the ICC undertook to confer upon the merged carriers immunity from the RLA because it affected the "particular method for integration of the physical operations involved . . . ." 295 I.C.C. at 702.

An additional difficulty is presented by the ICC's ruling with respect to the RLA generally. The ICC's interpretation of the immunity provision, as of its 1958 decision in *Chicago, St. Paul,* was that Congress had not given it the power to override the RLA at all. It reaffirmed that view in 1967 in *Southern Railway Co., supra,* when it stated that, in the absence of a stand-by agreement among the affected carriers and unions that would displace their existing CBAs in the event of a rail merger, "section 6 of the [RLA] would seriously impede mergers," 331 I.C.C. at 170-71—a statement that would not make sense if the agency thought it had the power simply to override § 6 "as necessary" to let an approved transaction go forward.

The ICC's current interpretation of the immunity provision departs from this view, but we have found no explanation for the departure, save a citation in *DRGW*—the 1983 case in which it adopted its current stance—and decisions following it, to the Eighth Circuit's 1963 decision in *Chicago & North Western Ry., supra.* Because that case arose out of a dispute between a carrier and the unions representing its employees, however—a dispute to which the ICC was not a party—the court did not have the beenfit of the agency's (then presumably contrary) views on the matter, nor did it cite any ICC precedent in support of its conclusion (apparently because, as of that time, none existed). For the ICC now to reverse its position solely on the basis of the court's holding is somewhat troubling, for three reasons. First, in 1967, in *Southern Railway Co.*, the ICC was still of the view, the Eight Circuit's intervening decision notwithstanding, that it lacked the authority to override the RLA. Second, in light of the ICC's close involvement with the historical development of the Act, it is disturbing that it would switch its position in unelaborated reliance upon a court case, which raised the issue in a different context and to which it was not a party, without giving any independent consideration to the matter. Third, the ICC has never related its current position to the context of the 1920 Act in which the immunity provisions first appeared; it has not, for example, related the original immunity provision in the 1920 Act to the comprehensive provisions of the same legislation governing labor-management relations, *see* 1920 Act, 41 Stat. 469-74—provisions that were, as we understand the legislative sequence, the immediate precursor to the RLA.

It may be that the ICC has made a conscious decision simply to depart from its earlier precedent. The ICC has not, however, said that it is doing so, much less articulated its reasons. As we stated in *Oil, Chemical and Atomic Workers Int'l Union v. NLRB*, 806 F.2d 269, 273-74 (D.C. Cir. 1986), "[w]e need hardly elaborate on the settled principle that an agency may not depart from its precedent without explaining and justifying its change in position."

Second. In light of our holding that § 11341(a) does not empower the ICC to override a CBA, it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA. In *The Carmen's Case,* the heart of the dispute before the ICC was whether either the Commission or, derivatively, the Committee, had the power to relieve CSX from the terms of Orange Book that, as the Committee had interpreted them, prohibited the proposed transfer of work and of employees. The RLA was implicated, as we understand

the dispute, only insofar as the Brotherhood argued that CSX could not unilaterally depart from the Orange Book without first complying with the procedures of the RLA. Because the ICC, in response, started from a premise (that § 11341(a) gave it the power to relieve CSX of its contractual responsibilities) and reached a conclusion (that the RLA could not stand in the way of that power) that we hold was in error, it appears that nothing turns any longer on its conclusion. We remand the case to the ICC for reconsideration, however, in order to enable it to assess the situation in the first instance.

As for *The Dispatchers' Case*, the ramifications of our CBA ruling are somewhat less clear. There the CBA issue was whether the ICC could, by means of the immunity provision, relieve the N&W of obligations under its existing CBA in connection with the transfer of supervisory positions from Roanoke to Atlanta; the ICC said that it could, and we have held that it erred on that point. The RLA issues, as we understand them, were (1) whether the carriers could effect the transfer without first complying with the procedures of the RLA; and (2) whether the transfer, insofar as it deprived employees of rights under their CBA, violated the RLA. The second issue seems to drop out of this case for the same reason as the RLA issue appears to have become irrelevant in *The Carmen's Case*: because we hold that the ICC may not relieve the carriers of obligations under the CBA, the question whether it would violate the RLA to do so is purely hypothetical.

The first issue, if we are correct in stating it—the record on this point is less than crystal clear—may yet be alive. The ICC's opinion, however, gives us pause; it states that the continuation of the old agreement will "jeopardize the transaction"—by which it means not the merger but the transfer to Atlanta—"because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribu-

tion function." J.A. 291. Similarly, the carriers, as intervenors here, note that had the ICC not set aside the Roanoke CBA, its continuation "would have prevented the consolidation from going forward . . . ." Because we hold that the ICC was without authority to set aside that CBA, it is unclear how the carriers will proceed. They may find it both impractical to adhere to the Roanoke CBA in the Atlanta setting, because it would introduce non-uniform work rules, and uneconomical to renegotiate the Roanoke CBA in order to achieve such uniformity; if so, they may determine simply to transfer the employees back to Roanoke. There would then be no issue left, so far as we can tell, regarding their duty to comply with the procedures of the RLA.

In light of this uncertainty as to the effects of our ruling on the continued vitality of the disputes before us, we think it best to remand them for the ICC to determine whether there is any live RLA issue remaining. Should the ICC determine that further proceedings are necessary on the RLA issue, it should, on remand, either provide an explanation for its new position on that issue, or adhere to its prior position.

C. *Other Issues*

We decline to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion, in *The Dispatchers' Case*, that § 4 of the *New York Dock* conditions gives the arbitration committee the "absolute right" to effectuate the transfer of employees, and to override any contrary provisions of a CBA. As noted earlier, the ICC has not argued the first theory to us at all; indeed, in its brief it took the position that the proceedings in *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, —— S. Ct. ——, —— (No. 87-1589, slip op. June 21, 1989) (*P&LE*), which was then pending before the Supreme Court, were not relevant here, even though its ex-

clusivity argument before the Supreme Court would appear also to encompass both the § 11347 theory and the § 4 rationale advanced in the decisions here under review. We do not consider as a basis for affirming the decisions a ground upon which the agency places no reliance on appeal. *Cf. SEC v. Chenery Corp.*, 318 U.S. 80 (1943). In any event, we think it best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position.

Because we hold that Congress did not, in enacting § 11341(a), give the ICC the power to override provisions of a CBA, we need not address either the Unions' arguments that to do so would be unconstitutional or their claim that, in amendments to the Act in 1976, Congress specifically preserved employees' contractual rights. Our decision also makes it unnecessary to reach either (1) the Brotherhood's argument in *The Carmen's Case* that the ICC applied an improper standard when it reversed the Committee's ruling in favor of the Union; or (2) the Association's argument that the ICC, in its decision in *The Dispatchers' Case*, deprived employees of their rights under § 2, *Fourth* of the RLA.

IV. Conclusion

Because § 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees, we grant the petitions for review in that respect and reverse the ICC's decision. We remand the cases with respect to the ICC's RLA holdings in order that the agency may determine whether further proceedings are necessary.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724

September Term, 1989

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

CSX Transportation, Inc.
Intervenor

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the United States of America,
Respondents

Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 29 1989

CONSTANCE L. DUPRÉ

CLERK

BEFORE: Wald, Chief Judge; Edwards and D. H. Ginsburg, Circuit Judges

ORDER

It is ordered, by the Court, *sua sponte*, that the opinion of the Court filed on July 25, 1989 is amended as follows:

At Page 2, last line

delete the word "cases" and insert in lieu thereof the word "records"

At Page 24, line 9

delete the word "case" and insert in lieu thereof the word "record"

At Page 26, last paragraph, line 5

delete the word "cases" and insert in lieu thereof the word "records"

At Page 26, last paragraph

Add the following new text:

See General Rule 15(c).

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: Wendy Jemus
for Robert A. Bonner
Deputy Clerk

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29430 (Sub-No. 20)

NORFOLK SOUTHERN CORPORATION—CONTROL—NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

Decided: May 24, 1988

The American Train Dispatchers Association (ATDA) seeks review of an arbitration panel's decision and award in *Norfolk and Western Railway Company, Southern Railway Company, and American Train Dispatchers Association*, (Harris, May 19, 1987) ("referee's award"). Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern) filed a joint reply. ATDA invokes our jurisdiction to review the referee's award under the standards announced in *Chicago & North Western Tptn. Co. - Abandonment*, 3 I.C.C.2d 729 (1987) (the so-called *Lace Curtain* decision). The carriers agree that we have jurisdiction but urge that the arbitration decision be affirmed.

We are accepting administrative review of this arbitration decision because it involves a dispute under the labor protective conditions imposed in *Norfolk Southern Corp.—Control—Norfolk & W. Ry. Co.*, 366 I.C.C. 173 (1982) (*Norfolk Southern Control*), and raises significant issues of general

importance regarding the interpretation of those conditions.[1] *See Lace Curtain, supra.*

Lace Curtain essentially adopted the standard enunciated by the Supreme Court in the so-called *Steelworkers Trilogy*.[2] In reviewing arbitral resolutions of disputes arising under collective bargaining agreements, courts do not vacate awards because of substantive mistake unless there is egregious error, the award fails to draw its essence from the collective bargaining agreement, or the arbitrator exceeds the specific contract limits on his authority. *Loveless* v. *Eastern Airlines, Inc.*, 681 F.2d 1272, 1275-76 (11th Cir. 1982). We adopted similar standards.

BACKGROUND

In 1982 in *Norfolk Southern Control*, this Commission authorized Norfolk Southern Corporation (NS) to acquire control of the separate railroad systems of N&W and Southern under 49 U.S.C. 11343, subject to the employee protective conditions in *New York Dock Ry. - Control - Brooklyn East. Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*). On Sep-

[1] On January 5, 1988, ATDA filed a so-called supplement to its earlier petition to review the arbitration award. It submitted a corrected filing on January 15, 1988. The carriers replied on January 26, 1988. The supplement is apparently intended to show that the award has potentially wider ramifications than the instant dispute and is being used by the carriers as precedent for adverse actions against ATDA members at other locations. The carriers deny that any breach of agreement has occurred and state that the practice ATDA mentions has been in effect for 28 years.

We need not address this matter further, because it appears that, even if an adverse action has occurred, it is wholly unrelated to the instant dispute. The proper procedure is for petitioners to submit such additional disputes to arbitration, where they can be resolved on their own merits on a complete record.

[2] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

tember 12, 1986, N&W and Southern notified ATDA that they intended to coordinate N&W's "distribution of power" work from an N&W facility in Roanoke, VA, to a Southern facility in Atlanta, GA. Distribution of power refers to the assignment of locomotives to particular locations and trains. At N&W, the work had been performed by Systems Operations Control (SOC) supervisors who are represented by ATDA in a collective bargaining agreement with N&W.[3] Under the carriers' coordination plan, the N&W work would be centralized into the Southern Railway Control Center, which would be responsible for the distribution of power for the entire combined N&W/Southern System. The work would be performed by Southern's Superintendents of Transportation (ST), who historically have been considered as management employees and as such would not be subject to a collective bargaining agreement. In a proposed implementing agreement, N&W and Southern offered the SOC supervisors the opportunity to follow their work by granting them first consideration for new ST positions to be created on the Southern, which are higher paid than the SOC positions on the N&W.

It is the intent of the carriers ultimately to distribute locomotive power throughout the combined system without regard to the historical territorial division, generally north-south, between N&W and Southern. Instead, power distribution functions would be aligned along an assertedly more

[3] In 1964, the former New York, Chicago, and St. Louis Railroad Company (the Nickel Plate) was merged into N&W, which agreed to assume all the Nickel Plate labor contracts including a 1951 agreement with ATDA. On August 2, 1968, the National Rail Adjustment Board in Award No. 16556 sustained ATDA's claim that the newly established N&W position of "power supervisor" embraced work subject to the agreement. Consequently, on April 1, 1971, N&W and ATDA executed a memorandum of agreement which recognized that the distribution of power by SOC supervisors was to be subject to the collective bargaining agreement between N&W and ATDA. The latest such agreement, executed in 1979, is still in force. It is not a part of the record in this proceeding, but there is no dispute between the parties as to its terms.

efficient east-west division of the combined system. This will permit substantial cost savings because fewer locomotives will be needed and the remaining locomotives can be used more efficiently. Moreover, the technology and procedures at Southern's Railway Control Center differ from N&W's in that Southern ST's have computer access to other divisions whereas the N&W SOC supervisors produce internal information that is displayed on a board located at the center. Thus, while N&W's SOC supervisors were given first consideration for the new jobs, the carriers have been unwilling to assign the transferred SOC supervisors the same duties and territorial responsibility they had on the N&W.

Believing that the proposed work coordination was a part of the *Norfolk Southern Control* transaction, the carriers opened negotiations with ATDA under Article I, section 4 of *New York Dock* in an effort to reach a mutually acceptable implementing agreement. After negotiations proved unsuccessful, the carriers invoked mandatory arbitration. A 3-member panel was selected, and a hearing held before a neutral referee.[4] The referee's award found (organization member Mahoney dissenting) that: the transfer was authorized by this Commission in *Norfolk Southern Control*; the arbitral issue was the proper application of *New York Dock* standards; and Article I, section 4 of *New York Dock* empowers the arbitral panel to modify existing collective bargaining agreements or to approve the transfer of work from a location subject to an agreement to a location where no agreement will apply. Accordingly, a revised implementing agreement submitted by the carriers (which granted SOC supervisors consideration, but no priority, for ST jobs) was placed in effect.[5]

[4] The neutral, Mr. Harris, was selected by the National Mediation Board (NMB) when the two partisan members were unable to agree on a neutral.

[5] The carriers' original proposed agreement and ATDA's proposed agreement were rejected as going beyond the terms of *New York Dock*, and the parties were thus given 14 days to negotiate revisions to the adopted agreement.

In a decision served June 10, 1987, we denied ATDA's petition to stay the referee's award. Subsequently, the carriers effected the coordination of work and offered Southern ST positions to all nine active and three furloughed N&W SOC supervisors. Nine of the twelve accepted and are now so employed; two declined and one retired. There were no displacements of other employees.

DISCUSSION AND CONCLUSIONS

Article I, section 2 of *New York Dock* requires that collective bargaining rights be preserved in a section 11343 transaction. Also, the Railway Labor Act (RLA) contains extended dispute resolution procedures and prohibits any unilateral change in rates of pay, rules, or working conditions during pendency of those procedures. However, Article I, section 4 of *New York Dock* provides for compulsory, binding arbitration of disputes. It has long been the Commission's view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission.[6] Absent such a resolution, the intent of Congress that Commission-authorized transactions be consummated and fully implemented might never be realized. Moreover, 49 U.S.C. 11341(a) exempts from other law a carrier participating in a section 11343 transaction as necessary to carry out the transaction.

ATDA argues first that: (1) the transfer of locomotive distribution functions from Roanoke to Atlanta was in violation of the RLA, and the arbitration panel's authorization

[6] The panel notes (p. 14) that the arbitration panel was created under the *New York Dock* conditions and then states, "[A]s a creature of the ICC, this panel is bound to the ICC view." We agree.

of the transfer was in excess of its jurisdiction; and (2) the Commission's approval of NS's control of N&W and Southern did not exempt the carriers from the RLA in regard to the subject transfer because (a) the coordination of locomotive distribution is not a transaction subject to approval by the Commission, and (b) the transfer was not specifically mentioned, and thus was not exempted, in the Commission's authorization in *Norfolk Southern Control*.

In our June 10th stay decision, we rejected this line of argument. We found that the arbitration panel's jurisdiction over the transfer stems from the Commission's jurisdiction over the control transaction. The transfer is not subject to the RLA because the Commission, in *Norfolk Southern Control*, authorized the coordination of N&W and Southern under NS, subject to *New York Dock*. The mandatory arbitration provisions of *New York Dock* take precedence over the RLA dispute resolution procedures in transactions approved by this Commission because, as we stated at pp. 6-7 in Finance Docket No. 30532, *Maine Central R.R. Co. et al. - Exemption from 49 U.S.C. 11342 and 11343* (not printed), served September 13, 1985 (*Maine Central*) (quoted in the referee's award at 12):

> It is the Commission order, not RLA or [the Washington Job Protection Agreement of 1936] that is to govern employee-management relations in connection with the approved transaction. Such a result is essential if transactions approved by us are not to be subjected to the risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions * * * Since there is no mechanism [in RLA] for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected.

Similarly, there can be no assurance that post-consummation coordinations contemplated as part of the transaction could ever be accomplished if RLA dispute resolution mechanisms were followed. Thus, the panel correctly found (referee's award at 12-14) that terms of the Commission's order, and specifically the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements. *Maine Central, supra*, at 6-7. Moreover, an action taken under our control authorization is immunized from conflicting laws by section 11341(a). *Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963). The proposed transfer, although not specifically mentioned in *Norfolk Southern Control*, is one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that we approved. Indeed, the arbitration panel found that coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction. *See* referee's award at 10-11. The carriers do not disagree. The arbitration panel, citing *Maine Central*, correctly exercised its jurisdiction over the dispute arising from the transfer. *See Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry., supra; compare United Transp. Union* v. *Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987).

Nor does the collective bargaining agreement between N&W and ATDA impair the panel's jurisdiction to authorize the transfer. *See Maine Central, supra*, at 6, 7 n.11 (rejecting argument that the preservation of collective bargaining rights and agreements in Article I, Section 2 of New York Dock somehow displaced the Article I, Section 4 mechanism for resolving disputes). *See also, Brotherhood of Locomotive Engineers* v. *ICC*, 808 F.2d 1570, 1576-78 (D.C. Cir. 1987) (collective bargaining rights normally preserved pursuant to Commission-imposed labor protection conditions must give way to permit consummation of a Com-

mission-approved transaction despite unilateral management change of working conditions.) Moreover, in Finance Docket No. 30,000 (Sub-No. 18), *Denver and R. G. W. R.R. Co.—Trackage Rights—Missouri P. R.R. Co. Between Pueblo, CO and Kansas City, MO, et al.* (not printed), served October 25, 1983, *rev'd sub nom. Brotherhood of Loc. Engineers* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd on other grounds* ___ U.S. ___, 107 S.Ct. 2360 (June 8, 1987), *cert. den.* ___ U.S. ___, 107 S.Ct. 3209 (June 15, 1987) (*DRGW*), we found that:

> As UTU notes, standard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under [49 U.S.C.] 11347 preserve conditions and agreements in the context of the authorized transaction.

ATDA further contends that, even if the arbitration panel had authority to override the collective bargaining agreement and the RLA, it should not have done so. Assertedly, the transfer of power distribution work to Atlanta could have been effected without abrogating the SOC supervisors' collective bargaining and contract rights, because the continuation of those rights would not create a "risk of nonconsummation." *See Maine Central, supra.* The jobs could simply be transferred subject to the collective bargaining agreement. ATDA notes that the arbitration panel made no factual finding that abrogation of the agreement was necessary to the transfer, much less to the ultimate control transaction. Rather, the referee's award simply states (*id.*

at 15): "It is clear that if the employees who are moved to Atlanta are consolidated with the present Atlanta employees, the present collective bargaining agreement between N&W and ATDA may not be carried along * * *."

In reply, the carriers acknowledge that the referee's award did not recite the record evidence upon which the panel based this conclusion. However, the carriers contend that, under the *Steelworkers Trilogy* standards, an arbitrator need not give his reason for an award and is entitled to deference in his ultimate factual findings. In any event, they argue, the record shows that the collective bargaining agreement would be inconsistent with and would frustrate the purpose of the coordination by preventing the carriers from realigning SOC job responsibilities to officer status and thus creating an integrated systemwide facility without regard to the historical N&W-Southern separation. In their view, ATDA's proposal would result in covered employees being limited to the work previously performed in Roanoke by SOC supervisors and to their work rules and lower salary schedule.

In *Lace Curtain*, we stated that "[w]e do not intend to review arbitrators' decisions on issues of causation, the calculation of benefits, or the resolution of other factual questions." We believe that this is precisely the nature of the review ATDA seeks. Petitioner does not contend that the referees' award contains egregious error, fails to "draw its essence" from the *New York Dock* conditions, or exceeds the panel's authority under *New York Dock*. Instead, in regard to this issue, it criticizes the panel's judgment and lack of detailed discussion. These alleged shortcomings are not matters we would review under *Lace Curtain*.

In any event, the record supports the conclusion of the arbitration panel. Imposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function.

Moreover, ATDA's unsupported allegation that jobs can be transferred subject to the agreement misconstrues the nature of the transaction. It is the work function, not jobs, that will be transferred, and new jobs will be created to perform this and other functions.

The referee's award is somewhat confusing on the related issue of whether Southern must recognize ATDA as the bargaining representative of the transferred SOC supervisors. Representation is a collective bargaining "right" and, as such, is protected by Article I, section 2 of *New York Dock*. The panel suggests (*id.* at 15) that its award abrogates not only the collective bargaining agreement but ATDA's representative status as well, yet it acknowledges (*ibid.*) that ATDA's rights as an incumbent bargaining representative are for determination by the National Mediation Board (NMB). It also acknowledges that the former SOC supervisors may join with the Southern ST's as a bargaining unit and petition the NMB for the selection of a bargaining representative.

We find that, under the circumstances present here, *New York Dock* does not preempt any NMB determination as to representation, as the panel seems clearly to have recognized. To the extent the award could be construed as suggesting otherwise, that construction is erroneous. This is not to say that ATDA may in fact retain its status. That, as the panel recognized, is for the NMB to determine, and we recognize that there are legal as well as practical obstacles to such recognition.[7]

[7] The policy of the NMB is to recognize systemwide bargaining units. ATDA correctly points out that exceptions have been made, but the case it relies on, *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974), is inapposite because its recognition of a less-than-systemwide class was based on the common law of contracts. It is unclear whether Southern's status as a successor employer mandates an exception to the NMB policy.

The courts have apparently not addressed this issue under the RLA. Under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, a successor employer may in some circumstances be obligated to recognize and bargain with the representative of its predecessor's employees. *See John Wiley & Sons, Inc.* v. *Livingstone*, 376 U.S. 543 (1964) and *NLRB* v. *Burns International Security Services Inc.*, 406 U.S. 272 (1972). NLRA cases are not controlling but have been held to offer an analogy in the solution of similar RLA problems. *See Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), *reh. den.* 394 U.S. 1024 (1969).

Finally, ATDA complains that the panel improperly imposed the carriers' proposed implementing agreement and not ATDA's. ATDA's proposed agreement provided for enhanced economic benefits, as well as continuation of its collective bargaining agreement. The panel concluded that ATDA's proposed implementing agreement, and the carriers' initial proposed agreement as well, could not be imposed because they went "beyond the terms of an implementing agreement set forth in *New York Dock.*"

ATDA contends that the *New York Dock* conditions are only a baseline, which the arbitrator may exceed. It contends further that the panel mistakenly assumed that it must adopt one of the proferred agreements in its entirety. We noted in our June 10th stay decision that ATDA has raised an interesting and perhaps significant issue concerning the authority of the arbitration panel. As such, we will review the panel's determination as meeting the *Lace Curtain* criteria for review.

We fashioned the *New York Dock* conditions to satisfy the level of employee protection mandated by section 11347. We have consistently recognized our authority to require a greater level of protection in any given case. *See* Finance Docket No. 30965, *Delaware & Hudson Ry. Co. - Lease and Trackage Rights Exemption - Springfield Terminal Ry. Co., et al.*, 4 I.C.C.2d ___ (served February 25, 1988). It does not follow, however, that, once we determine the appropriate level of protection, an arbitrator is free to impose a higher level. On the contrary, the arbitration panel's au-

thority is derived solely from the *New York Dock* conditions themselves, and nothing in those conditions authorizes the arbitrator to expand the basic benefit structure prescribed by the Commission. Rather, it is the arbitrator's task to determine the appropriate *application* of conditions prescribed by the Commission. The proper forum for employees seeking a level of labor protection in excess of *New York Dock* is thus not in the arbitration of individual disputes but rather before this Commission where we consider the merits of the section 11343 transaction. In fact, in *Norfolk Southern Control*, labor interests sought a higher level of protection, but we found that *New York Dock* was appropriate. 366 I.C.C. at 229-31. In so doing, we did not delegate to an arbitrator the authority to overturn this determination.

Of course, an arbitrator has discretion to fashion a remedy within the limits of *New York Dock*. To this end, he may combine specific proposals of the parties, may develop compromises, or may even develop his own conditions, limited only in each case by the Commission-mandated level of protection. Nothing in the referee's award demonstrates a misunderstanding of this principle. On the contrary, the referee's award expressly modifies the proposed implementing agreement by adding a condition that the parties meet to consider whether any mutually agreeable revisions could be imposed.

ATDA does not contend that the higher level of protection it seeks is consonant with *New York Dock*. In fact, it tacitly acknowledges that the implementing agreement adopted by the panel provides the minimum economic benefits described in Article I, section 9 of *New York Dock*. It follows that the additional economic benefits ATDA proposed, *i.e.* priority consideration for ST positions,[8] transfer of accrued vacation and sick leave, additional moving allowances,[9] and displacement allowances for employees who choose not to follow their jobs, exceed *New York Dock* and were properly rejected.[10] As noted above, ATDA's proposal that its collective bargaining agreement be maintained (mischaracterized in ATDA's petition as a proposal for continued representation) was also properly rejected. In the circumstances, it is inconsequential that the panel did not explain exactly how the implementing agreements it rejected exceeded *New York Dock*.

[8] The proposal for priority consideration is moot in light of Southern's hiring of all willing SOC supervisors. The record does not indicate whether those who declined Southern positions would be eligible for the proposed displacement allowance.

The referee's award will be affirmed. This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The decision and award in *Norfolk and Western Railway Company, Southern Railway Company, and American Train Dispatchers Association* is affirmed.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Lamboley dissented with a separate expression.

(SEAL)

Noreta R. McGee
Secretary

[9] The carriers state in this regard (reply, p. 20) that, "[b]y virtue of being Southern Railway officers, the former SOC supervisors have already received a generous package of relocation benefits." *See also* reply, p. 31.

[10] A particular benefit may "draw its essence" from *New York Dock* without being specifically enumerated there. ATDA has made no such allegation here.

COMMISSIONER LAMBOLEY, dissenting:

The decision of the arbitration panel failed to appropriately accommodate the aspects of representation and recognition under the RLA with the consolidation transaction under the ICA. In my view, the failure to do so requires reversal and remand.[1]

The matter should be remanded to the arbitration panel with instructions to reconcile the perceived RLA/ICA conflict and effect a balancing of interests necessary to achieve transfer of SOC work activity from Roanoke to Atlanta without termination of representation rights or other unnecessary displacement of RLA rights. It should be recognized that Section 11341(a) does not operate in absolute terms exempting application of other laws, rather only to the extent necessary to carry out the proposed transaction. Moreover, conditions imposed under Section 11347 operate to preserve conditions and agreements in the context of the authorized transaction, whenever possible. Thus, assuming the transaction at issue is proximally within the scope of the approved transaction, the arbitaraion must specifically determine whether, and to what extent, (1) other laws need be necessarily displaced and (2) existing

[1] Because I find representation and recognition the central issues on appeal, I do not address the disposition of other issues in this case. Although causation is neither free from doubt nor necessarily clear after reviewing the original consolidation case or the underlying panel decision, I do assume the transfer transaction here at issue is one reasonably contemplated or foreseeable as a consequence of the 1982 consolidation transaction approved in the *NS-Control* case. Consequently, the transaction is properly subject to the *NY Dock* conditions and dispute resolution procedures.

In short, while distant in time, it has not been satisfactorily established on the record that transfer does not have a proximate nexus with original consolidation. See *Southern Railway Company - Control - Central of Georgia Railway Company*, 317 I.C.C. 729 (1963) aff'd sub. nom. *RLEA v. U.S.* 266 F. Supp. 521 (E.D. Va 1964) vacated on other grounds 379 U.S. 199 (1984). This is not to say on remand such a showing could not be made in this case.

working conditions and provisions of collective bargaining agreements are in conflict with the transaction approved by the Commission.[2]

For the Commission's part, I believe the majority's affirmation of the panel decision merely compounds the error on appeal. The majority attempts, after a fashion, to rationalize a position affirming the arbitration award. The reasoning is not altogether clear.

Representation rights accorded to employees, individually and as a group, under the RLA basically provide that employees shall have the rights (1) to select a representative chosen by the majority and (2) to have the representative so chosen recognized by their employer for the purposes of collective bargaining.[3] It is from provisions of the RLA, not the collective bargaining agreement, that the right to representation and recognition derive. Indeed, the contrary is true; it is the collective bargaining agreement which is derived from the exercise of the rights of representation and recognition.

In this case, ATDA has been selected as the employee representative, and has been recognized as such by the employer, initially the N&W,[4] and now, following the *NS-Control* merger/consolidation, the NS.[5]

[2] See generally *Schwabacher v. United States*, 334 U.S. 182 (1948); *City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977) Cert den. 435 U.S. 950 (1978); and *Denver & R.G.W. R.R. Co. - Trackage Rights - Missouri Pac. R.R. Co. Between Pueblo Co. and Kansas City, MO* (not printed), served October 25, 1983; revs'd sub. nom. *BLE v. I.C.C.* 761 F.2d 714 (D.C. Cir. 1985) revs'd on other grounds ___ US ___(1987). Also *Leavens v. Burlington Northern*, 348 I.C.C. 962 (1977).

[3] 45 U.S.C. §152.

[4] This flows from the 1964 Nickel Plate merger, assumption of contracts, the 1968 NRAB Award No. 16566, and the 1979 Agreement.

[5] If the employees, although subject to transfer, nonetheless remain employees, their employer, i.e. the entity with ultimate employment authority, is the NS. The *NS-Control* case confers such authority and

In this instance then, the status of representation and recognition may not be terminated by a transaction under the ICA. Exclusive jurisdiction over representation issues belongs to the National Mediation Board under the RLA.[6]

Both the arbitration panel and Commission majority acknowledge that basic proposition, but nevertheless, proceed to terminate RLA representation rights. The RLA rights at issue here are not in conflict with the ICA. Although in the absence of an agreement or an appropriate order, the portability of the collective bargaining agreement may be open to question,[7] the portability of representation and recognition rights are not so dubious. Indeed, such rights and status are generally presumed to continue until the contrary is shown.[8]

The arbitration panel was in error in finding that "this (transfer) does not change the rights of individual employees".[9] Such rights have surely been changed, both individually and collectively, despite their establishment and protection under the RLA.

The panel was simply wrong when it asserted "what is lost by the transfer is the incumbancy status of the ATDA,

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status on NS. To conclude otherwise would deny NS the requisite control authority to effect the transfer under the ICA, and the corresponding ICA jurisdictional considerations here. In another case, the RLA alone would apply to changes here proposed if employer status was confined to N&W. Indeed, the entire proceedings are premised on ICA jurisdiction and *NS-Control*, both before the arbitration panel and the Commission.

[6] See e.g., 1943 "Switchman's Union" Trilogy; *Switchman's Union of N.A. v. NMB*, 320 U.S. 297; *Gen. Comm. v. M-K-T R. Co.*, 320 U.S. 323, *Gen. Comm v. Southern Rac. Co.*, 320 U.S. 388

[7] See *Burlington Northern, Inc. v. Am. Ry. Super. Assn.*, 503 F.2d 58 (7th Cir. 1974) Cf. *Norfolk & Western R. Co. v. Nemitz* 404 U.S. 37 (1971); *Laturner v. BN, Inc.*, 501 F.2d 593 (9th Cir. 1974) and *Miller v. Missouri Pac. Ry. Co.*, 372 F. Supp. 170 (W.D. LA 1974)

[8] See *Dooley v. Lehigh Valley R. Co.*, 21 A2d 334 (NJ e.g. 1941).

[9] Award, p. 15.

a status arrived at through recognition, not through election."[10] Not only does this statement seemingly confuse the status of recognition with the process by which employees select their representative, it is clear that the legally protected status of recognition of an employee representative is the same whether achieved through voluntary recognition by an employer or as a mandatory result of an election process. The panel's attempted distinction is not only contrary to law,[11] it is contrary to fact.[12]

The panel, likewise, erred when it concluded that "the protection afforded by New York Dock are to individual employees, not their collective bargaining representatives".[13] First, as mentioned previously, the rights at issue are those of the employee, individually, and collectively, flowing from and protected by statute. The essence of representation and recognition is the right of individual employees to act collectively through a freely selected representative. It is that employee right ATDA is here asserting as the employees' representative, and for which ATDA has an affirmative obligation and duty to do so.[14] The panel's position suggests that employees themselves, rather than their representatives are somehow the proper and necessary parties to here claim representation and recognition rights. This position I find wholly untenable.

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[10] Id.

[11] See *Assn of Flight Attendants, et al. and TWA*, N.M.B. No. 63 (1987); also *Akkon, Canton & Y. R. Co. v. IBEW*, 237 F. Supp. 343 (N.D. Ill. 1964).

[12] N&W's Recognition of ATDA was initially voluntary, and later was required by the National Rail Adjustment Board in Award No. 16556 (1968).

[13] Award, p. 15.

[14] The duty of fair representation is an evolutionary product of federal common law with statutory origins. See e.g. 45 U.S.C. §152 (ninth), *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944).

Without doubt, no tribunal established under the ICA may claim authority to terminate representation rights. The arbitration panel expressly acknowledges its jurisdictional limitations,[15] but nonetheless proceeds to effectively terminate those rights. On appeal, the majority of the Commission also acknowledges that the ICA cannot and does not pre-empt RLA representation rights, yet in its affirmation, exercises its authority to approve termination of RLA rights.

In my view, this case should be remanded to the arbitration panel for purposes of accommodating RLA representation rights and/or seeking views of NMB regarding construction of such rights in instances of transfer within a commonly controlled, merged rail system.[16] The latter course may be particularly helpful since this admittedly is a case of first impression, and the NMB has long been recognized as being vested with exclusive authority over representation issues.[17]

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[15] *Award* p. 15.

[16] See comment on "employer" status of NS as successor employer in context of merger. (Footnote 4). Obviously, an ICA control case does not bind the NMB in determining employer status for purposes of the RLA.

[17] Cf. *Southern Ry. Co. v. Combs.*, 484 F.2d 145 (6th Cir. 1973), suspension of proceedings and referral to NMB under doctrine of "primary jurisdiction."

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724

September Term, 1989

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

CSX Transportation, Inc.
Intervenor

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the United States of America,
Respondents

Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 29 1989

CONSTANCE L. DUPRÉ

CLERK

BEFORE: Wald, Chief Judge; Edwards and D. H. Ginsburg, Circuit Judges

ORDER

These causes came on to be heard on the petitions for review of orders of the Interstate Commerce Commission and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by the Court, that the petitions for review are granted in part and the records herein are remanded to the Commission for further proceedings, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: Wendy Jemus
for Robert A. Bonner
Deputy Clerk

Date: July 25, 1989

Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724

September Term, 1989

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

CSX Transportation, Inc.
Intervenor

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the United States of America,
Respondents

Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 29 1989

CONSTANCE L. DUPRÉ

CLERK

BEFORE: Wald, Chief Judge; Edwards and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of Intervenors CSX Transportation, Inc. and Norfolk and Western Railway Company and Southern Railway Company, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: Wendy Jemus
for Robert A. Bonner
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724

September Term, 1989

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the United States of America,
Respondents

Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals For the District of Columbia Circuit

FILED SEP 29 1989

CONSTANCE L. DUPRÉ CLERK

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

The Suggestions For Rehearing *En Banc* of Intervenors CSX Transportation, Inc. and Norfolk and Western Railway Company and Southern Railway Company have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: Wendy Jemus
for Robert A. Bonner
Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724

September Term, 1989

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

CSX Transportation, Inc.
Intervenor

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the United States of America,
Respondents

Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals
For the District of Columbia

FILED SEP 29 1989

CONSTANCE L. DUPRÉ

CLERK

BEFORE: Wald, Chief Judge; Edwards and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of the Interstate Commerce Commission (ICC) and of the motion of petitioners for leave to file a response thereto it is

ORDERED, by the Court, that the Clerk is directed to file petitioners' lodged response and it is

FURTHER ORDERED, by the Court, that consideration of the aforesaid petition is deferred pending release of the ICC's decision on remand.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK
BY: Wendy Jemus
for Robert A. Bonner
Deputy Clerk

(3) (4)

Nos. 89-1027 and 89-1028

In the Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

CSX TRANSPORTATION, INC., PETITIONER

v.

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether, under 49 U.S.C. 11341(a), a party that has entered into a merger approved by the Interstate Commerce Commission is exempt from provisions of a collective bargaining agreement that may jeopardize the implementation of the merger.

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OCTOBER TERM, 1989

No. 89-1027

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

No. 89-1028

CSX TRANSPORTATION, INC., PETITIONER

v.

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 880 F.2d 562.[1] The court of appeals' order of September 29, 1989, amending its prior opinion is unreported (Pet. App. 27a-28a). The opinion of the In-

[1] References to "Pet. App." are to the appendix to the petition in No. 89-1027.

terstate Commerce Commission in No. 89-1027 (Pet. App. 29a-46a) is unreported, while the Commission's opinion in No. 89-1028 (89-1028 Pet. App. 33a-52a) is reported at 4 I.C.C.2d 641.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1989. Petitions for rehearing in both cases were denied on September 29, 1989 (Pet. App. 49a-50a). The petitions for a writ of certiorari in both cases were filed on December 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Statutory Framework

Sections 11341 and 11344 of the Interstate Commerce Act (Act), 49 U.S.C. 11341, 11344, generally require that covered rail carriers secure the approval of the Interstate Commerce Commission (ICC) before conducting specified transactions, including mergers (see 49 U.S.C. 11343). Under Section 11344(c), the ICC must approve any such merger proposal "when it finds the transaction is consistent with the public interest."

Pursuant to Section 11347 of the Act, 49 U.S.C. 11347, the ICC imposes upon the parties a set of labor-protective conditions. Those conditions, derived from the Commission's decision in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90, aff'd, 609 F.2d 83 (2d Cir. 1979), establish, among other things, procedures for the resolution—by means of negotiation and, failing that, binding arbitration—of labor disputes arising from ICC-approved railroad consolidations. Accordingly, Section 4 of

the *New York Dock* conditions, 360 I.C.C. at 84, requires a "railroad contemplating a transaction which . . . may cause the dismissal or displacement of any employees, or rearrangement of forces [to] give at least ninety . . . days written notice. . ." (Pet. App. 3a). Section 2, 360 I.C.C. at 85, provides that "[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements" (Pet. App. 3a-4a).

Finally, Section 11341(a), the so-called immunity provision, provides that upon ICC approval of a Section 11343 transaction:

> A carrier * * * participating in that approved * * * transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

B. Proceedings Below

1. *No. 89-1027*

a. In March 1982, the ICC approved the application of NWS Enterprises, Inc. (now Norfolk Southern, or NS), a holding company, to acquire control of two rail carriers, petitioners Norfolk and Western Railway Company (N & W) and Southern Railway Company (Southern). In its order approving control, the ICC imposed the standard *New York Dock* labor-protective conditions. Pet. App. 6a.

Respondent American Train Dispatchers' Association (the Association) was the bargaining representative of certain N & W employees responsible for "power distribution"—the process by which locomotives are assigned to particular

trains and facilities. In September 1986, petitioners informed the Association that they intended to consolidate all power distribution for the combined Norfolk Southern operation by transferring the work performed at the N & W power distribution center in Roanoke, Virginia, to the Southern center in Atlanta, Georgia. The carriers proposed that affected N & W employees would be "given consideration" for employment in new positions as superintendents in Atlanta. Superintendents in Atlanta were considered management, however, and were therefore not covered by any collective bargaining agreement. Pet. App. 6a-7a.

The Association thereafter sought to negotiate the terms under which the proposed transfer would be implemented. The negotiations foundered, however, over the Association's contentions that (1) the carriers' proposal was subject to mandatory bargaining under the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*; (2) the carriers were required to preserve the right of the transferred employees to representation under the RLA; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the collective bargaining agreement with N & W. The carriers then asked the National Mediation Board to appoint an arbitrator pursuant to Section 4 of the *New York Dock* conditions. Pet. App. 7a.

The dispute thereafter came before a three-member arbitration committee, which ruled in favor of the carriers on each of the disputed issues. The committee concluded that (1) it had the authority to abrogate any provision of a collective bargaining agreement or of the Railway Labor Act that impeded implementation of the ICC-approved merger between N & W and Southern; (2) the transfer of power distribution functions was part of the control transaction approved by the ICC; and (3) transferred employees could not retain their rights under the collective bargaining agreement. Pet. App. 7a.

b. The Commission affirmed by a divided vote (Pet. App. 29a-46a). It explained that "[i]t has long been the Commission's view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 [of the *New York Dock* conditions] when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission" (*id.* at 33a). Accordingly, the Commission stated, "the panel correctly found * * * that * * * the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements" (*id.* at 35a). Moreover, the ICC added, because the proposed transfer was incident to the merger approved by the Commission, it was "immunized from conflicting laws by section 11341(a)" (*ibid.*). Finally, the Commission upheld as appropriate the decision to override the collective bargaining agreement and the RLA provisions. Reviewing the record, the Commission noted that "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function" (*id.* at 37a).[2]

2. *No. 89-1028*

a. In 1980, the ICC approved a proposal under which CSX Corporation would acquire control of two other holding companies: (1) the Chessie System, Inc., whose prin-

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[2] Commissioner Lamboley dissented (Pet. App. 42a-46a). In his view, the case should have been remanded to the arbitration panel for a determination of whether, and to what extent, the provisions of the collective bargaining agreement could have been accommodated, consistent with the goal of completing the approved transfer.

cipal railroad subsidiaries were the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railroad Company; and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Railroad (later to become petitioner, CSX Transportation, Inc.). As required by Section 11347 of the Act, the Commission imposed a standard set of labor protective conditions, derived from *New York Dock*. Pet. App. 3a-4a.

At the time of the consolidation, Chessie operated a heavy freight car repair shop in Raceland, Kentucky, and Seaboard operated a similar shop in Waycross, Georgia. In 1986, CSX, invoking Section 4 of the *New York Dock* conditions, notified the respondent labor organizations that it intended to close the Waycross shop and to transfer the employees and the work from that shop to the Raceland shop. The transfer was to result in a net decrease in available jobs at the two shops. Pet. App. 4a.

Relations between CSX and the unions representing its employees were governed at the time by a collective bargaining agreement known as the "Orange Book," negotiated to implement a previously authorized merger. The Orange Book provided, among other things, that the carrier would employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." In return for that job protection, the Orange Book gave the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated system * * *." Pet. App. 4a.

Once notified of the proposed transfer of work and employees, respondent Brotherhood of Railway Carmen (the Brotherhood) attempted to negotiate an implementation agreement on behalf of the affected employees. Negotiations foundered, however, due to disagreements about (1) whether the displaced Waycross employees would retain their Orange Book rights; and (2) whether the proposed transfer would result in a change of working conditions and, if so, whether CSX would be required to comply with the Railway Labor Act before effecting such a change. CSX invoked arbitration under the *New York Dock* conditions, and the matter came before a three-member arbitration panel. Pet. App. 4a-5a.

The arbitration panel concluded that the Orange Book prohibited the proposed transfer of work and employees. The panel stated, however, that as an "extension of the ICC," it had the authority to abrogate any Orange Book provision, and to relieve CSX from any requirement of the RLA, that impeded the transfer decision. The panel then held that (1) it would abrogate the Orange Book prohibition on the transfer of work, but not on the transfer of employees, and (2) it would exempt CSX from the RLA insofar as the statute might require the carrier to bargain before unilaterally changing the Orange Book with respect to the transfer. Pet. App. 5a-6a.

b. By a divided vote, the Commission affirmed in part and reversed in part (89-1028 Pet. App. 33a-52a). The Commission agreed that the arbitrators were "empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement" (*id.* at 43a). But it rejected the panel's refusal to permit the transfer of employees to Raceland. The Commission reasoned that if, as the panel had found, the Orange Book prohibits such a transfer of employees, then to enforce the Orange Book in this setting would "serve[ ] as an impediment to implementation of a transaction authorized by the Commission" (*id.* at 44a). The Commission also found that, in light of the positions available at

Raceland and the number of Waycross employees eligible for those positions, "[i]mposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction" (*id.* at 45a). The Commission accordingly reversed the arbitrators' decision "to the extent it holds that CSX may not require transfer of [Seaboard] employees as well as work from Waycross to Raceland" (*id.* at 44a).[3]

3. ***The Court of Appeals' Decision***

The court of appeals considered the two cases together and reversed and remanded (Pet. App. 1a-26a). The court held that Section 11341(a) of the Act does not authorize the Commission to relieve a party to a Section 11343 transaction of collective bargaining agreement provisions that impede implementation of the transaction. The court stated that the Commission's contrary view found "no support in the language of the statute," explaining that the phrase "other law" in Section 11341(a) cannot be read to include "all legal obstacles" (Pet. App. 12a). The court also found no evidence in the legislative history to support the Commission's construction of the statute. In the court's view, "Congress focused nearly exclusively * * * on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract" (*id.* at 18a).

The court next "decline[d] to address the question" (Pet. App. 19a) whether Section 11341(a) may operate to over-

[3] Commissioner Lamboley dissented (89-1028 Pet. App. 46a-52a). He expressed "substantial doubt" that the proposed transfer of work and employees was a transaction authorized by the Commission's prior approval of the control by CSX of Chessie and Seaboard (*id.* at 46a). He also rejected the proposition that "*any* conflict, regardless of origin or degree, is an impediment pre-empted by [Interstate Commerce Act] provisions" (*id.* at 49a).

ride provisions of the RLA, choosing instead to remand that issue to the Commission. The court observed that the Commission's present position with respect to the RLA "depart[s] from its earlier precedent" (Pet. App. 23a), and it therefore directed the agency on remand either to "provide an explanation for its new position on that issue, or adhere to its prior position" (*id.* at 25a). The court also explained that, "[i]n light of [its] holding that § 11341(a) does not empower the ICC to override a [collective bargaining agreement], it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA" (*id.* at 23a). Because of that "uncertainty as to the effects of [the] ruling on the continued vitality of the disputes," the court decided to remand the RLA issue to the Commission "to determine whether there is any live RLA issue remaining" (*id.* at 25a).

Finally, the court "decline[d] to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion * * * that § 4 of the *New York Dock* conditions gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, and to override any contrary provisions of a [collective bargaining agreement]" (Pet. App. 25a). In the court's view, the Commission had not raised those claims in its court of appeals' brief. "In any event," the court concluded (*id.* at 26a), it is "best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of" this Court's intervening decision in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989).

4. Pursuant to the court of appeals' remand order, the Commission thereafter determined that further hearings were necessary. By order served September 20, 1989, the Commission "reopen[ed] the[ ] proceedings so that [it] could address and explain in detail [its] views on the issue

specifically remanded; *i.e.*, whether the provisions of 49 U.S.C. 11341(a) operate to override the provisions of the Railway Labor Act (RLA), as well as on the general issues raised in these proceedings, particularly the impact of our approval of a transaction under 49 U.S.C. 11343 and imposition of our standard labor conditions upon the parties' rights and remedies under the RLA and with respect to existing collective bargaining agreements" (*CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, ICC Dec. Finance Doc. No. 28,905 (Sub No. 22) (Aug. 31, 1989) [hereinafter ICC Dec. Finance Doc. No. 28,905]). The Commission added that "[i]n light of the importance of the legal issues involved and [its] intention to conduct a comprehensive examination of [its] authority under 49 U.S.C. 11341, 11343, and 11347, etc., and the labor conditions [it] ha[s] customarily imposed in approving railroad consolidations," the agency was therefore "seeking further comment by the parties to these proceedings as well as any other interested parties" (*ibid.*).

The Commission also filed a "limited" petition for rehearing in the court of appeals. In it, the agency advised the court of its "intention to reopen these proceedings and to promptly issue a comprehensive decision on remand addressing issues [the agency] believe[s] the court directed [it] to reconsider and those left open for resolution in further proceedings." The Commission accordingly "requested that the court refrain from ruling on [the agency's] petition for rehearing until [the agency has] issued [its] decision on remand." ICC Dec. Finance Doc. No. 28,905.

On September 29, 1989, the court of appeals issued an order stating that the Commission's petition for rehearing would be "deferred pending release of the ICC's decision on remand" (Pet. App. 54a). Moreover, the court amended its decision to remand only the "records," thus retaining jurisdiction over the case (*id.* at 28a). Briefs by interested

parties have now been filed with the Commission, and the agency entertained oral argument on January 4, 1990.

ARGUMENT

Petitioners challenge (89-1027 Pet. 10-24; 89-1028 Pet. 8-19) the court of appeals' decision holding that Section 11341(a) does not extend to provisions of a collective bargaining agreement. Although the Commission has differed with the court of appeals on that issue, we believe that, in light of the court's retention of jurisdiction and the ongoing proceedings before the Commission, the petitions for a writ of certiorari are premature and should not be granted.

The court of appeals remanded the record to the Commission to resolve a series of issues related to the scope of Section 11341(a). Pursuant to that order, the Commission is presently exploring a variety of alternative bases—left open by the court of appeals' decision—for allowing approved consolidations to go forward without resort to the extended bargaining procedures required by the RLA. It is entirely possible that the Commission will adopt a position on one or more of these alternatives that may obviate the difficulties entailed by the court of appeals' decision; at a minimum, the agency expects to create a fuller record on which to defend its decision if, and when, the case returns to the court of appeals.

In particular, the court of appeals expressly declined to address the Commission's arguments based on Section 11347 and on Section 4 of the *New York Dock* conditions, and also declined to decide whether Section 11341(a) contemplates that covered carriers may be exempted from the requirements of the RLA, including the provisions for resolution of disputes. Thus, the Commission's ultimate disposition of the case on remand may not be affected

by the court of appeals' present decision. Following that disposition, the court of appeals would have an opportunity to review the matter anew, in light of the reconsidered, and more fully elaborated, views of the Commission.

We believe that the proceedings on remand should be permitted to take their course. Should the court of appeals thereafter revisit the matter, it would do so on the basis of a more complete record and a better developed statement of the agency's position. If, at that point, review by this Court is warranted, the case should then present a more appropriate vehicle for resolution of the disputed issues.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

JOHN J. MCCARTHY, JR.
Deputy Associate General Counsel
Interstate Commerce Commission

FEBRUARY 1990

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* The Solicitor General is disqualified in this case.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00746

(4) (5)

Nos. 89-1027 and 89-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Petitioners,
v.
AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

CSX TRANSPORTATION, INC.,
Petitioner,
v.
BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR UNION RESPONDENTS IN OPPOSITION

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February 28, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

QUESTION PRESENTED

Whether a party that has consummated a transaction pursuant to Interstate Commerce Commission approval and authorization as provided in 49 U.S.C. 11343 and 11344 is exempt under 49 U.S.C. 11341(a) from provisions of collective bargaining agreements that may impede implementation of certain operational aspects of the consummated transaction?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

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BRIEF FOR UNION RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a)[1] is reported at 880 F.2d 562. The amendatory order of the court of appeals of September 29, 1989, is unreported. (Pet. App. 27a-28a.) The opinion of the Interstate Commerce Commission in No. 89-1027 (Pet. App. 29a-46a) is

[1] "Pet. App." references are to the appendix to the petition in No. 89-1027 unless otherwise indicated.

unreported, but the Commission's opinion in No. 89-1028 (No. 89-1028, Pet. App. 33a-52a) is reported at 4 I.C.C. 2d 641.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1989. Petitions for rehearing were filed by CSX Transportation, Inc. and Norfolk and Western Railway Company and Southern Railway Company and were denied on September 29, 1989. (Pet. App. 49a-50a.) The petitions for a writ of certiorari in both cases were filed on December 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Statutes Involved

Section 11343(a) of the Interstate Commerce Act ("Act"), 49 U.S.C. 11343(a), lists six specifically described financial transactions that the Interstate Commerce Commission ("ICC" or "Commission") is authorized to approve. Section 11344, 49 U.S.C. 11344, requires ICC approval of such transactions upon application by a qualified applicant when the Commission "finds the transaction is consistent with the public interest", 49 U.S.C. 11344(c). Section 11343(a) of the Act, 49 U.S.C. 11343(a), prohibits carriers by railroad from engaging in such transactions absent ICC approval.

Section 11347 of the Act, 49 U.S.C. 11347, requires the Commission to impose "a fair arrangement" for the protection of the interests of employees who may be affected by the Commission's order of approval and specifies certain minimum protections which the Commission must impose as part of the "fair arrangement". The minimum statutory protections were developed in *New York Dock Ry.-Control-Brooklyn Eastern District Terminal,* 360 I.C.C. 60, *aff'd,* 609 F.2d 83 (2nd Cir. 1979). These conditions require a ninety-day written notice of any changes

which may affect employees and, before any such changes can occur, a voluntary or arbitrated implementing agreement must be reached with the representatives of affected employees on the selection of forces to perform the consolidated work and the assignment of employees to those forces. (Pet. App. 3a; No. 89-1028, Pet. App. 79a.) The minimum statutory conditions also require preservation of "rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise . . . unless changed by future collective bargaining agreements." (Pet. App. 3a-4a.)

Section 11341(a), the focus of the court of appeals' decision, provides in part:

> A carrier . . . participating in that [approved] transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property and exercise control or franchises through the transaction.

B. Proceedings Below

1. *No. 89-1027*

Some four and one-half years after the Commission had approved and the applicants had consummated the control of the Norfolk and Western Railway Company ("N&W") and the Southern Railway Company ("Southern") by NWS Enterprises, Inc. (now "Norfolk Southern" or "NS"), a holding company, respondent American Train Dispatchers Association ("ATDA") was informed that N&W and Southern intended "to coordinate certain [N&W] work performed in the System Operations Center . . . in Roanoke, Virginia into the [Southern] Control Center in Atlanta, Georgia". (Pet. App. 6a-7a.)

The carriers sought to negotiate an implementing agreement under section 4 of the *New York Dock* conditions under which the N&W supervisors represented by ATDA in Roanoke would be "given consideration" for employment as superintendents in Atlanta with the Southern Railroad. On the Southern, however, these employees were considered management, not covered by a collective bargaining agreement and not represented by a union. Negotiations for an implementing agreement failed because of ATDA's position that (1) the carriers' proposal was subject to mandatory bargaining under the RLA; (2) the carriers were required to preserve the right of the transferred employees to representation under Railway Labor Act ("RLA") section 2 Fourth, 45 U.S.C. 152 Fourth; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the collective bargaining agreement ("CBA") with N&W. (Pet. App. 7a.) The carriers requested the appointment of an arbitrator by the National Mediation Board and after hearing, the three person arbitration panel concluded by a divided vote that (1) it had the power to abrogate any CBA or RLA provision that impeded implementation of the ICC-approved merger of the operations of the N&W and the Southern; (2) the transfer of locomotive power functions, though not specifically considered by the ICC in approving NS control of the railroad some four and a half years earlier, was part of the control transaction; and (3) because application of the N&W collective bargaining agreement to any superintendents at the Southern facility would somehow impede the transfer, the transferred employees could not retain their rights under that collective bargaining agreement. (Pet. App. 7a.)

By a divided vote, the Commission affirmed the arbitration panel. (Pet. App. 29a-46a.) The Commission expressed the "view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission." (Pet. App. 33a.) The Commission held that, in accordance with that view, the panel had correctly found that Article I, section 2 of *New York Dock* which "requires that collective bargaining rights be preserved in a section 11343 transaction" (Pet. App. 33a) must give way to the "compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, . . . [which takes] precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements." (Pet. App. 35a.) The Commission finally concluded that the "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function." (Pet. App. 37a.)[2]

2. *No. 89-1028*

In 1980, the ICC approved an application by CSX Corporation, Inc., a newly-formed holding company, to acquire control of two other holding companies: (1) the Chessie System, Inc., the principle railroad subsidiaries of which were the Chesapeake & Ohio Railroad Company ("C&O") and the Baltimore & Ohio Railroad Company ("B&O"); and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Line Railroad ("Seaboard") (later to become CSX Transportation, Inc. or "CSX"). The ICC imposed upon those railroads the standard formula of employee-protective conditions as required by section 11347 of the Act, 49 U.S.C. 11347. (Pet. App. 3a.)

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[2] The dissent of Commissioner Lamboley (Pet. App. 42a-46a) concludes *inter alia* that "no tribunal established under the ICA may claim authority to terminate representation rights" but, while both the arbitration panel and the majority of the Commission acknowledged their inability to "pre-empt RLA representation rights," each proceeded "to effectively terminate those rights". (Pet. App. 46a.)

Six years later CSX, invoking section 4 of the *New York Dock* conditions, notified respondent Brotherhood of Railway Carmen ("Carmen") that it intended to close its freight yard repair shop at Waycoss, Georgia and transfer the work performed there to the C&O repair shop at Raceland, Kentucky. Carmen attempted on behalf of affected employees to negotiate an agreement governing the changes that the Waycross-Raceland consolidation would require. (Pet. App. 4a.)

Relations between CSX and the unions representing many of its employees were governed by an agreement known as the "Orange Book" which had been negotiated in connection with a 1967 merger that created Seaboard from the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company. The Orange Book provided that the resulting carrier would employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment period." In consideration for that job protection, the Orange Book gave the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated [*i.e.* Seaboard] System . . . ." (Pet. App. 4a.)

Negotiations between CSX and Carmen failed due to disagreements as to (1) whether displaced Waycross employees would retain their Orange Book right to lifetime income; and (2) whether (a) the Waycross-Raceland consolidation would result in a change in working conditions, and, if so, (b) CSX would be required to comply with the terms of section 6 of the RLA, 45 U.S.C. 156, and thus, to negotiate an agreement before effecting the proposed change. Arbitration was invoked under the *New York Dock* conditions and the matter came before an arbitration panel with the Carmen participating under

protest. (Pet. App. 5a.) The arbitration panel agreed with the Carmen that the Orange Book prohibited the proposed transfer of work and employees, but held that as a "quasi-judicial extension of the ICC" it was authorized to abrogate provisions of the CBA and to relieve CSX of any requirement of the RLA that stood in the way of an operational change, such as a shop transfer. (Pet. App. 5a.) The majority of the arbitration panel then held that it would abrogate the Orange Book's prohibition on the transfer of work, but not on the transfer of employees outside the old Seaboard System, and also would exempt CSX from RLA requirements insofar as they might require the carrier to negotiate an agreement effecting a change in the Orange Book with respect to the work transfer. (Pet. App. 5a-6a.)

The Commission, by a divided vote, upheld the panel majority's conclusions in all but its decision not to abrogate the Orange Book prohibition on a transfer of employees. (No. 89-1028, Pet. App. 33a-52a.) The Commission affirmed the panel majority's finding that "the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation" and concluded that the panel was correct in finding that "it was empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement." (No. 89-1028, Pet. App. 43a.) The Commission, however, overturned the decision of the arbitration panel to the extent that it held "that CSX may not require transfer of SCL employees as well as work from Waycross to Raceland" because imposition "of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." (*Id.* 45a.)[3]

[3] In his dissent, Commissioner Lamboley concluded that the majority opinion "represents a continuing effort to modify Commission precedent and runs contrary to existing judicial precedent" in its "attempts to establish the proposition that *any* conflict, regardless of origin or degree, is an impediment preempted by ICA provisions." (*Id.* 49a.)

3. *The Court of Appeals' Decision*

Separate petitions for review of the ICC decisions in the two cases were filed with the court of appeals which considered the two cases together and remanded them to the Commission. (Pet. App. 1a-26a.) The court held that section 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees. (Pet. App. 26a.) The court concluded that "the ICC's position finds no support in the language of the statute". (Pet. App. 12a.) The court also thought it unlikely "that Congress would grant the ICC a power with so much potential to destabilize the railroad industry . . . without so much as a word to that effect in the statute itself." (Pet. App. 13a.) The court reviewed the legislative history of section 11341(a) and concluded that there was no evidence whatever that the Congress "either broadened that provision so as to reach 'all legal obstacles' to an ICC-approved transaction, or acted more specifically to bring 'contracts' or 'collective bargaining agreements' within the reach of the statute." (Pet. App. 18a-19a.)

The court declined to address the issue of whether section 11341(a) might operate to override the provisions of the Railway Labor Act (Pet. App. 19a) for two reasons: first, because there has been no finding by any tribunal that such an override was "necessary" to effect the approved transaction (Pet. App. 19a-23a) and, second, because in "light of our holding that § 11341(a) does not empower the ICC to override a CBA, it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA." (Pet. App. 23a-25a.)

The court declined "to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion, in the *Dispatchers'* case, that § 4 of the *New York Dock* conditions give the arbitration committee the 'absolute right' to effect the transfer of employees and to override any contrary provisions of the CBA." (Pet. App. 25a.) The court did not address those issues because "the ICC has not argued the first theory to us at all" and "its exclusivity argument before the Supreme Court [in *P&LE R. Co. v. RLEA*, 491 U.S. ——, 109 S.Ct. 2584 (1989)] would appear also to encompass both the § 11347 theory and the § 4 rationale advanced in the decisions here under review." (*Id.* 25a-26a.) The court concluded that it would not "consider as a basis for affirming the decision a ground upon which the agency places no reliance on appeal" and closed with the admonition that "in any event, we think it best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position." (*Id.* 26a.) The court remanded the cases with respect to the ICC's RLA holding "in order that the agency may determine whether further proceedings are necessary." (*Id.* 26a.)[4]

Following remand, the ICC determined that further hearings were necessary "in order to permit the Commission to properly assess the role of the Commission and its labor conditions in railroad consolidations." (*CSX Corporation-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, ICC Decision, Finance Docket No. 28905 (Sub-No. 22) (August 31, 1989) [hereinafter, ICC Dec. F.D. No. 28905 (Sub-No. 22)].) The Commission stated that it was "reopening these proceedings so that

[4] Just over two weeks after the court of appeals issued its opinion in these cases, the ICC published its decision in *Brandywine Valley R. Co.—Purchase—Etc.*, 5 I.C.C.2d 764 (1989) in which it observed at page 772 n.5:

> In that [*Carmen*] case, the court ruled only that the exemptive provisions of 49 U.S.C. § 11341(a) did not authorize the Commission to relieve the parties to a collective bargaining agreement from their obligations under that contract (slip op. at 12-19). *We do not dispute the validity of this limited holding by the Court.* (Emphasis supplied.)

we may address and explain in detail our views on the issues specifically remanded; *i.e.*, whether the provisions of 49 U.S.C. 11341(a) operate to override the provisions of the Railway Labor Act (RLA) as well as on the general issues raised in these proceedings, particularly the impact of our approval of a transaction under 49 U.S.C. 11343, *et seq.* and imposition of our standard labor conditions upon the parties' rights and remedies under the RLA and with respect to existing collective bargaining agreements." (*Ibid.*) The Commission went on to seek "further comment by the parties to these proceedings as well as any other interested parties" because "of the importance of the legal issues involved and our intention to conduct a comprehensive examination of our authority under 49 U.S.C. 11341, 11343 and 11347, etc. and the labor conditions we have customarily imposed in approving railroad consolidations." (*Ibid.*) The ICC also filed a "limited" petition with the court of appeals seeking a rehearing of that court's ruling, but advised the court of its decision to reopen the proceedings and "to promptly issue a comprehensive decision on remand addressing issues we believe the court directed us to reconsider and those left open for resolution in further proceedings" and requested "that the court refrain from ruling on our petition for rehearing until we have issued our decision on remand." (*Ibid.*)

The court of appeals, on September 29, 1989, issued an order stating that the Commission's petition for rehearing would be "deferred pending release of the ICC's decision on remand". Pet. App. 54a.) The court also amended its decision to remand only the "records", thereby retaining jurisdiction over the case. (*Id.* at 28a.) Comments were filed by all interested parties as requested by the Commission; and, following its rejection of objections of the rail unions, including ATDA and Carmen, to its order as exceeding the limits of the remand order, the ICC held oral argument on January 4, 1990. The Commission held an open voting conference on February 9, 1990, stating

that a written decision on remand would be issued in approximately one month from that date.

ARGUMENT

Petitioners herein challenge the holding of the court of appeals that section 11341(a) does not authorize the ICC to override the provisions of a collective bargaining agreement. (No. 89-1027 Petition, 10-24; No. 89-1028 Petition, 8-19.) Union respondents ATDA and Carmen respectfully submit that the petitions for a writ of certiorari are premature and should not be granted because the court of appeals has retained jurisdiction and because of the current proceedings before the Commission. Additionally, the writs have not met the "imperative public importance" criterion set forth in Rule 11 of the Rules of this Court.

The court of appeals remanded the record to the Commission to determine whether any RLA procedures remained to be completed in light of its holding that the collective bargaining agreements could not be overridden. (Pet. App. 24a, 25a.) Upon receipt of the remand order, the Commission determined to explore what legal means it might have for superceding the employees' rights under the Railway Labor Act, if such rights would impede implementation of a consummated merger. The Commission may develop a position satisfactory to petitioners and legally acceptable to the court of appeals.

In any event, the court of appeals expressly declined to address the Commission's arguments based upon section 11347 of the Act and section 4 of the *New York Dock* conditions; nor did it decide whether section 11341(a) may exempt carriers from the requirements of the RLA. Consequently, the Commission's decision on remand may not be affected by the current decision of the court of appeals in this case. When the Commission's written decision is published, it will be presented to the court of appeals which will have an opportunity to review it and

determine whether the Commission was legally correct in its affirmance of the ATDA arbitration panel and its partial affirmance and partial reversal of the Carmen arbitration panel.

We respectfully submit that the court of appeals should be permitted to revisit these matters in a setting in which the Commission will have been able to utilize all legal theories that all interested parties could present to it. If, following a review of that decision by the court of appeals, further review by this Court is deemed warranted, the case may then present an appropriate vehicle for resolution of the disputed issues.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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February 28, 1990

No. 89-1027

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In The

Supreme Court of the United States

October Term, 1989

Norfolk and Western Railway Company and
Southern Railway Company,

Petitioners,

v.

American Train Dispatchers Association,
Interstate Commerce Commission and
United States of America,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1027

NORFOLK AND WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,

Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

The federal respondents and respondent American Train Dispatchers Association misapprehend the significance of what the Court of Appeals has already done, and attach too much significance to what the Interstate Commerce Commission may possibly decide to do in the wake of the Court of Appeals' decision. The Court of Appeals' misinterpretation of the scope of the 49 U.S.C. § 11341(a) exemption "from all other

law" will adversely affect these petitioners and all other railroads *now*, in matters that have nothing to do with ICC review of arbitration awards rendered under the employee protective conditions mandated by 49 U.S.C. § 11347, and in forums other than the ICC. Nothing the ICC does in its eventual action in the proceedings on remand will change this situation.

1. The ICC's holding on remand, whatever it may be, will not define the limits of the reach and operation of the § 11341(a) exemption "from all other law." The exemption is self-executing; it does not depend on ICC action at all, beyond the initial approval of the transaction to which the exemption attaches. *Schwabacher v. United States*, 334 U.S. 182, 194-95 (1948). The ICC is not charged with sole responsibility for determining whether a railroad may claim the benefit of the exemption. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 300 n.13 (1987) (Stevens, J., concurring) ("*Any tribunal* that is faced with a claim that a party is violating some 'other law' has the responsibility of determining whether an exemption is 'necessary to let that person carry out the transaction . . . .' " (quoting 49 U.S.C. § 11341; emphasis added)).

2. Contrary to the suggestion of the federal respondents, Br. In Opposition at 11, no position that the ICC adopts will "obviate the difficulties entailed by the court of appeals' decision." That decision covered a far more extensive subject matter than will the ICC's decision on remand. The court concluded that the § 11341(a) exemption does not apply to labor agreements because, in the court's view, the exemption does not apply to *contracts* of any type. The Court of Appeals' decision, if not reversed here, will

obviously be influential (and binding, in the District of Columbia federal courts) in cases that involve contracts that are not labor agreements. The matters now pending before the ICC on remand, however, involve only Railway Labor Act claims, and the only agreements involved are labor agreements. The ICC's decision on remand will address no broader subject, for the Commission's charge from the Court of Appeals is to consider only (1) whether the § 11341(a) exemption overrides the Railway Labor Act; and (2) whether the § 11347 command to impose labor protection independently confers on the ICC the authority to preclude the assertion of Railway Labor Act claims in cases like this one. The ICC may well find its statutory authority sufficient to displace Railway Labor Act remedies and permit the modification of labor agreements. But this ruling would have no effect on the broader question whether the § 11341(a) exemption reaches other types of contracts.

3. There is no reason to think the Court of Appeals will reexamine the question whether the § 11341(a) exemption reaches contracts generally when the court reviews the ICC's eventual decision on remand. The ICC has said it does not dispute the court's holding,[1] and the court has already declined to rehear the case or consider it *en banc*. Meanwhile, the ability of these petitioners, and all other railroads, to carry out transactions that have been approved as in the public interest will remain vulnerable to defeat through claims asserted, in state and federal courts, under private contracts other than labor agreements—claims which

[1] *Brandywine Valley R.R.—Purchase—CSX Transportation, Inc.*, 5 I.C.C. 2d 764, 772 n.5 (1989), *appeal docketed*, No. 89-1503 (D.C. Cir. Aug. 21, 1989).

for forty-two years have been understood to be barred by the statutory exemption as authoritatively interpreted in *Schwabacher*.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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Nos. 89-1027 & 89-1028

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
Petitioners,
v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

CSX TRANSPORTATION, INC.,
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v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS

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IN THE

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS

This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 37.2. The National Railway Labor Conference ("NRLC") urges the Court to grant the petitions for writs of certiorari in these two cases, which seek review of the same decision of the District of Columbia Circuit.

STATEMENT OF THE CASE

Under § 11343 of the Interstate Commerce Act ("ICA"), railroad mergers and consolidations and other similar transactions "may be carried out only with the approval and authorization of the" Interstate Commerce Commission ("ICC").[1] Under ICA § 11344, when considering a proposed merger or consolidation, the ICC must balance a number of factors, including "the interest of carrier employees affected by the proposed transaction," and "shall approve and authorize" the transaction "when it finds the transaction is consistent with the public interest." The ICC is then required under ICA § 11347 to impose labor protective conditions to compensate employees for adverse effects resulting from the transaction.

Section 11341(a) of the ICA provides that the ICC's authority under §§ 11343-11347 is "exclusive," and that "a carrier, corporation, or person participating in" a transaction approved under those provisions "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *."[2]

[1] The ICA was codified in 1978 as Subtitle IV of 49 U.S.C. Public Law 95-573, 92 Stat. 1337. Citation herein to a current section of the Act is to that section of 49 U.S.C.

[2] Current § 11341(a) derives from former § 5(11) of the ICA, which was enacted in 1940 to provide that the Commission's authority over mergers and consolidations "shall be exclusive and plenary," and that carriers participating in such approved transactions "shall be and they hereby are relieved from the operation of the antitrust laws and of *all other restraints, limitations, and prohibitions of law, Federal, State, or municipal,* insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission * * *." Transportation Act of 1940, ch. 722, § 7(11), 54 Stat. 899, 905 (1940) (emphasis added). Similar provisions have appeared in the ICA since 1920. See Transportation Act of 1920, ch. 91, § 407(8), 41 Stat. 456,

The question presented by the petitions in these cases is whether the exemption from "all other law" in § 11341(a) applies to provisions of collective bargaining agreements, otherwise enforceable under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, that if enforced would prevent a carrier from "carrying out" an approved merger or consolidation.

In each of the two instant cases, the petitioners, pursuant to merger authority granted by the ICC, proposed to consolidate certain operating functions on the merged railroad systems, which would require the transfer of some work and employees. Affected employees would, however, be entitled to make-whole compensatory benefits under the ICC's standard *New York Dock* Labor protective conditions required under ICA § 11347 for all transactions undertaken pursuant to merger authority under ICA § 11343.[3]

Under the *New York Dock* conditions, an "implementing agreement" providing the terms for any rearrangement of work-forces must be in place before a transaction can be consummated; binding arbitration is required on any such implementing issues that remain unresolved through negotiations after 90 days' notice of the proposed transaction is given to unions representing affected employees.[4] In these cases, the respondent unions argued in the implementing arbitration proceedings that their collective bargaining agreements would not permit (and in No. 89-1028, actually prohibited) the transfers of work and employees on the terms proposed by the car-

482 (1920). Section 5(11) was recodified "without substantive change" as § 11341(a) in 1978. Public Law 95-473 § 3(a), 92 Stat. 1466.

[3] See *New York Dock Ry.—Control—Brooklyn E.D. Terminal,* 360 I.C.C. 60, 84-90 (1979), *aff'd sub nom. New York Dock Ry.* v. *United States,* 609 F.2d 83 (2d Cir. 1979).

[4] *New York Dock, supra,* 360 I.C.C. at 85.

riers, and that the consolidations must therefore be delayed until the carriers exhausted the RLA "major dispute" procedures for negotiating changes to collective bargaining agreements. Those procedures, as this Court has noted, are notoriously "long and drawn out" and "almost interminable." [5] If these RLA procedures are exhausted without yielding agreement, arbitration is available, but cannot be compelled,[6] and when unions refuse arbitration they are free to resort to strikes and nationwide secondary picketing to block changes proposed by carriers.[7]

The arbitrator in each of these cases rejected the unions' arguments that their collective bargaining rights under the RLA could be enforced to prohibit the proposed transactions. The unions appealed the arbitration awards to the ICC, which also held in each case that § 11341(a) relieved the carriers of the obligations the unions had asserted under the RLA and their collective bargaining agreements since these obligations would otherwise defeat the proposed transactions. (No. 89-1027 App. 33a-35a, 37a; No. 89-1028 App. 44a).

The unions sought review of the ICC's decisions in the District of Columbia Circuit, which "dispose[d] of the two cases together because they raise[d] common issues with respect to the ICC's authority [under ICA § 11341(a)] to exempt a party to a merger between two railway carriers" from "the provisions of (1) a Collective Bargaining Agreement (CBA); and (2) the Railway Labor Act * * *." (No. 89-1027 App. 2a). The court of appeals held that the exemption under § 11341(a)

[5] *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246, 244 (1966); *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969).

[6] See *Elgin J. & E. R. Co.* v. *Burley*, 325 F.2d 711, 725 (1945).

[7] See *Burlington Northern* v. *Maintenance Employes*, 481 U.S. 429, 450-53 (1987).

from "all other law * * * as necessary * * * to carry out" an approved merger or consolidation, does not apply to RLA collective bargaining agreements, because, in the court's view, the exemption should confer immunity only from "positive enactments, not common law rules of liability, as on a contract." (*Id.* at 18a). In light of that holding, the court of appeals deemed it unnecessary to decide whether the § 11341(a) exemption applies to the RLA itself, and remanded that issue, among others, to the ICC. (*Id.* at 25a).

The ICC, in a document styled "Petition for Rehearing," advised the court of appeals that it would conduct proceedings on the remanded issues, and asked the court to hold the "Petition" pending the outcome of those proceedings. The court of appeals has deferred consideration of the ICC's petition until the decision on remand is issued, and the original panel has amended its judgment to retain jurisdiction of the cases. (No. 89-1027 Pet. App. 54a, 27a-28a).

INTEREST OF *AMICUS CURIAE*

The NRLC is an unincorporated association which includes most of the nation's major railroads among its members. The NRLC represents its members in multiemployer collective bargaining under the RLA and with respect to other labor relations issues of general concern to the railroad industry that may arise before federal and state courts, legislatures, and administrative agencies.

The question presented in these cases is of paramount importance to the railroad industry. The ability of carriers to rationalize their operations through mergers and consolidations is critical to the maintenance of a viable national railroad transportation system. The decision below creates substantial doubt as to whether carriers will have that ability any longer, for the holding that § 11341(a) does not exempt carriers from obligations under collective bargaining agreements paves the way for

rail labor to interpose its asserted private interests under agreements as impediments or even absolute bars to the implementation of mergers and consolidations authorized by the ICC under the ICA's public interest standard. That doubt will exist even where no express merger-barring provision is included in a collective bargaining agreement (as in the case in No. 89-1027), because the unions have asserted in the proceedings before the ICC in this matter that transfer of work and employees in mergers and consolidations is effectively barred by seniority rules and other general rules that, in the NRLC's experience, are included in virtually *every* work-rule agreement in the railroad industry. Unless the decision below is reversed promptly, many carriers will be deterred from undertaking mergers and consolidations, or from further implementing those already approved by the Commission and underway. Accordingly, the NRLC and its member railroads have a vital interest in prompt resolution by this Court of the uncertainty created by the decision below as to the railroads' right to implement mergers and consolidations on the terms approved by the ICC.

SUMMARY OF ARGUMENT

The petitions for certiorari demonstrate that the decision of the District of Columbia Circuit is in conflict with decisions of this Court and of other circuits and is flatly contrary to the plain language of § 11341(a) and its legislative history. The NRLC will not repeat that showing here, but will address itself to the reason why this Court should grant review of the question presented in these cases *now*, notwithstanding the pendency of further proceedings on other questions before the ICC and the court of appeals. Simply put, the question presented by the decision below is of such imperative public importance that immediate review by this Court is warranted.[8] Congress has determined and repeatedly stated that railroad consolidations and mergers are generally in the public interest. Congress has vested the ICC with exclusive jurisdiction to determine whether individual mergers and consolidations comport with the public interest standard and to establish the conditions upon which such transactions may go forward. Under the decision below, the private interests of rail labor under RLA collective bargaining agreements may trump both the general public interest determination of the Congress and the individual public interest determinations of the ICC by blocking approved mergers and consolidations. The resulting uncertainty as to the ability of carriers to implement mergers and consolidations approved by the ICC threatens to call an immediate halt to such transactions, contrary to the public interest and the express intent of Congress. Immediate review by this Court is necessary to remove that injurious uncertainty.

ARGUMENT

The Decision Below Threatens to Bring an Immediate Halt to The Implementation of Railroad Mergers and Consolidations that Congress Has Determined Are in the Public Interest and Should be Encouraged, and Therefore Immediate Review by this Court is Warranted.

The cardinal purpose of the ICA, as this Court has observed, is "the maintenance of an adequate rail transportation system." *United States* v. *Lowden*, 308 U.S. 225, 230 (1939). That purpose is today expressed in ICA § 10101a, which establishes the "policy of the United States" with respect to the railroad industry. See § 10101a(3), (4), (5). And for over 60 years, Congress has sought to effectuate that purpose by encouraging rail-

[8] Indeed, this Court granted certiorari on a similar question, in very similar circumstances, in *ICC* v. *Locomotive Engineers*, 482 U.S. 270 (1987). In that case the District of Columbia Circuit had vacated ICC orders which relied on § 11341(a) to reject a union's

road mergers and consolidations. As this Court explained in *Lowden, supra,* "[a]s a result of the Transportation Act in 1920," the progenitor of the modern ICA, "consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy * * * so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." 308 U.S. at 232.

Congress has repeatedly reaffirmed that "established national policy." The Transportation Act of 1920, which left mergers and consolidations largely to the Commission's initiative (see 308 U.S. at 232), proved insufficient to its end. In the Transportation Act of 1940, therefore, Congress amended the ICA to add the predecessor of current § 11343, giving rail carriers principal authority to initiate mergers and consolidations. § 7(2), 54 Stat. 905. The chief goal of this amendment "'was to facilitate merger and consolidation in the national transportation system.'"[9]

Congress last revisited this issue in the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub. L. 94-210, 90 Stat. 31, which continued the

claim that its collective bargaining agreement and the RLA barred implementation of a § 11343 transaction as approved by the Commission; the court held that the ICC was required to make explicit findings as to the necessity for the § 11341(a) exemption and remanded the case back to the ICC for further proceedings. *Brotherhood of Loc. Engineers* v. *ICC*, 761 F.2d 714, 716 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270 (1987). This Court granted certiorari "on the question of the proper construction of § 11341(a)" despite the remand order (although the Court ultimately concluded on other procedural grounds that the question was not properly presented in that case). 482 U.S. at 277, 284, 286-87. *Cf.* Supreme Court Rule 11, authorizing writs of certiorari before judgment.

[9] *Maintenance Employes* v. *United States*, 366 U.S. 169, 173 (1961), *quoting County of Marin* v. *United States*, 356 U.S. 412, 416 (1958).

national pro-merger policy. The 4-R Act "was an attempt to restructure the railroad industry in the face of chronic financial losses and line closures."[10] It sought to promote an efficient rail transportation system through (among other things) "the encouragement of efforts to restructure the system on a more economically justified basis" by providing "an expedited procedure for determining whether merger and consolidation applications are in the public interest * * *." 4-R Act § 101(a)(2), 90 Stat. 33, codified at 45 U.S.C. § 801(a)(2). Once again, Congress avowedly "intended to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system * * *."[11]

The decision below strikes an immediate and potentially crippling blow to this important national policy. If RLA collective bargaining agreements can be enforced to prohibit the implementation of approved mergers and consolidations, notwithstanding the express exemption in ICA § 11341(a) from all obligations under "other law" that might otherwise have such merger-barring effect, and if, as the unions contend, those agreements cannot be altered except through the RLA major dispute provisions, then rail labor will have "carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC" or to "block consolidations which are in the public interest," as the United States Court of Appeals for the Eighth Circuit has recognized.[12] The federal courts have long agreed that subjecting the implementation of an approved merger or consolidation to the RLA major dispute procedures, with

[10] *Railway Labor Exec. Ass'n* v. *ICC*, 784 F.2d 959, 965 (9th Cir. 1986).

[11] S. Rep. No. 94-499, 94th Cong. 1st Sess. 20-21 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 34.

[12] *Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107, 112 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987).

their attendant delays and ultimate threat of strikes, would "threaten to prevent many consolidations" and mergers, because "under the Railway Labor Act [major dispute] provisions it is possible for either party to completely block any change in working conditions by refusing to agree to a change and refusing to arbitrate." [13]

Until the decision below, the courts have likewise agreed that it is "inconceivable" that Congress could have intended to grant rail labor such a "veto" power over transactions Congress and the ICC have determined are in the public interest.[14] The decision below nonchalantly accepts the possibility that such a labor veto exists, opining, for example, that the carriers in No. 89-1027 might as well decide to cancel the disputed consolidation in that case, regardless of the outcome of the issues remanded to the ICC, in view of the court's holding that ICA § 11341(a) could not be applied to "set aside" any agreement that "would have prevented the consolidation from going forward * * *." (No. 89-1027 App. 25a).

While the possibility of such a labor veto over mergers and consolidations exists, few, if any, of these transactions are likely to go forward. That can be seen from the history of the litigation over the application of RLA major dispute procedures to line sales to new regional railroads under ICA § 10901, which culminated in this

[13] *Brotherhood of Loc. Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 431 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); accord *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971).

[14] *Missouri Pacific*, *supra*, 782 F.2d at 112; see also, *e.g.*, *Brotherhood of Loc. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 799-801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Nemitz*, *supra*, 436 F.2d at 845; *Chicago & N.W. Ry.*, *supra*, 314 F.2d at 432; *Railway Labor Exec. Ass'n* v. *Guilford Transp. Indus., Inc.*, 667 F. Supp. 29, 34-35 (D. Me. 1987), *aff'd*, 843 F.2d 1383 (1st Cir.) (Table), *cert. denied*, 109 S. Ct. 3213 (1989). See also *ICC* v. *Locomotive Engineers*, 482 U.S. 270, 296-99 (1987) (Stevens, J., concurring).

Court's decision last Term in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Exec. Ass'n*, 109 S. Ct. 2584 (1989). Prior to 1987, the federal courts had repeatedly and consistently rejected rail labor's efforts to veto these transactions under the RLA. In 1987, however, the United States Court of Appeals for the Third Circuit held that unions have the right to strike to prevent such sales,[15] and followed up in 1988 with a decision holding that such sales may be delayed pending exhaustion of the RLA major dispute procedures.[16] The resulting uncertainty about the right of carriers to sell lines under § 10901 without the unions' consent had "an immediate" chilling "impact on the formation of small railroads, threatening to halt the revitalization of marginal railroad sectors—a restructuring that the Commission ha[d] found to be in the interest of carriers, labor, and the shipping public." [17] This Court granted certiorari to resolve the uncertainty that the Third Circuit's rulings had created, and ultimately rejected the veto power rail labor claimed over § 10901 sales. 109 S. Ct. at 2597.

The need for immediate review by this Court is even more acute in these cases than it was in the *Pittsburgh & Lake Erie* cases. The decision below threatens a similar immediate chilling effect on mergers and consolidations, transactions that the Congress itself has repeatedly and unequivocally found to be in the public interest and vital to the national rail transportation policy. Only a

[15] *Railway Labor Exec. Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987), *rev'd on other grounds*, 109 S. Ct. 2584 (1989).

[16] *Railway Labor Exec. Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *rev'd*, 109 S. Ct. 2584 (1989).

[17] *FRVR Corp. et al.*, ICC Finance Docket No. 31205, p. 8 (served Jan. 29, 1988), *aff'd as clarified on other grounds sub nom. Railroad Labor Exec. Ass'n* v. *ICC*, 861 F.2d 1082 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 3209 (1989), *rev'd on other grounds*, 888 F.2d 1227 (8th Cir. 1989).

definitive ruling by this Court on the question presented can ensure that the decision below will not allow rail labor to frustrate this important federal policy.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petitions for certiorari, the Court should grant writs of certiorari to review the decision of the District of Columbia Circuit.

Respectfully submitted,

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Nos. 89-1027 and 89-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY, *Petitioners*,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents*.

CSX TRANSPORTATION, INC., *Petitioner*,

v.

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA, *Respondents*.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF CONSOLIDATED RAIL CORPORATION IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

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BRIEF *AMICUS CURIAE* OF CONSOLIDATED RAIL CORPORATION IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

Consolidated Rail Corporation ("Conrail") is a rail carrier headquartered in Philadelphia, Pennsylvania. It primarily offers freight service in the northeast and midwest corridors over more than 28,000 miles of track. Conrail's 1988 year-end operating revenues exceeded $3.4

billion and its total assets as of the end of 1988 exceeded $7 billion.[1]

After nearly 20 years of efforts to restructure the northeast and midwest rail systems, Conrail has emerged as a publicly owned, self-sustaining corporation. Like all rail carriers, Conrail faces the constant challenge of remaining competitive in an increasingly deregulated transportation market. This challenge may require Conrail to enter into "control" transactions[2] that must be approved by the Interstate Commerce Commission ("Commission" or "ICC"). The court of appeals decided that the Commission's approval of a control transaction does not permit participating rail carriers to implement the approved transaction when it conflicts with the requirements of private contracts (including, for example, collective bargaining agreements). That decision is therefore of great significance to Conrail and threatens to have an immediate and deleterious impact upon its corporate planning and the efficiency of its operations.

ARGUMENT

The decision below is wrong. It conflicts with the decision of this Court in *Schwabacher* v. *United States*, 334 U.S. 182 (1948), and with the decisions of every other court of appeals that has considered the issue. The court of appeals rejected the Commission's interpretation of the statute it administers and did so on a basis that dis-

[1] This brief is filed pursuant to Rule 37.2 of the Rules of this Court, accompanied by the written consent of all parties.

[2] Control transactions include mergers, consolidations, purchases, leases, contracts to operate property of another carrier, acquisitions of trackage rights and other acquisitions of control. 49 U.S.C. § 11343(a).

regarded the standards of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

The decision below has enormous consequences for Conrail and other rail carriers and disregards the protection for railroad employees Congress deemed appropriate. Contrary to the assertion of the federal respondents, proceedings on remand will not obviate the need for review of the question presented. Delaying such review would cause significant disruption in corporate planning decisions and create uncertainty that will adversely affect the public interest. For these reasons, which we discuss below, review now is warranted.

1. The court of appeals held that Section 11341(a) of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11341(a), does not permit carriers participating in an ICC-approved control transaction to implement the transaction when it conflicts with the requirements of a collective bargaining agreement. Pet. App. No. 89-1027 at 12a, 19a. Section 11341(a) provides that a carrier participating in an approved control transaction "is exempt from the antitrust laws and from *all other law*, including State and municipal law, as necessary to let that person carry out the transaction . . .." (Emphasis added.)

In the court of appeals' view, "all other law" comprehends only "positive enactments, not common law rules of liability, as on a contract." Pet. App. No. 89-1027 at 18a.[3]

[3] The previous version of § 11341(a), former § 5(11) of the ICA, immunized participants "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal," thus making clear that the immunity encompasses not only positive enactments, but all restraints, limitations and prohibitions of law. The 1978 recodification of this provision as § 11341(a) did not effect any substantive change. Act of Oct. 13, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466. *See also* H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 158-68 (1978).

This narrow interpretation of the meaning of "law" harks back to another case involving a railroad decided more than half a century ago. The issue in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), was whether the phrase "laws of the several states" as used in the Rules of Decision Act, 28 U.S.C. § 1652, meant only statutory law or included common law. This Court held, of course, that "laws" meant both.[4]

Section 11341(a) therefore does not support the meaning the court of appeals gave it. To be sure, Section 11341(a) does not expressly refer to contracts. But contracts can impede control transactions because they have the force of law behind them—that is, because they are legally enforceable.[5] Thus, prior decisions had recognized

[4] *See also Munn* v. *Illinois*, 94 U.S. 113, 125-26, 133-34 (1877) (power to regulate commerce is superior to the power of private citizens to create rights at common law where the subject matter is affected with a public interest); *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (ICA abandonment procedures preempt state tort claims based on alleged violation of state common law); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-47 (1959) (Supremacy Clause preempts state common law rights that interfere with federal policies); *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (ICA preempts state common law action by shipper for allegedly unreasonable rate).

Similarly, this Court has long held that the federal government acting lawfully under the Commerce Clause may modify private contracts concerning matters within the government's regulatory powers without violating the Fifth Amendment. *Connolly* v. *PBGC*, 475 U.S. 211, 225 (1986); *Norman* v. *Baltimore & O. R.R.*, 294 U.S. 240, 306 (1935).

[5] Moreover, the law giving effect to collective bargaining agreements is not the common law, but a "positive enactment," the Railway Labor Act ("RLA"), *see* 45 U.S.C. § 152 Seventh. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142, 156 (1969) (§ 152 Seventh of RLA "operates to give legal and binding effect to collective agreements"); *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320 (1972) (rail labor agreements not enforceable in state court). Thus, even assuming the court of appeals' distinction between common law and positive enactments were correct, its holding is nevertheless clearly erroneous and should be reversed.

that Section 11341(a) immunizes participants from all legal obstacles, not simply from positive enactments. *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 800 (1st Cir. 1986), *cert. denied*, 479 U.S. 829 (1987); *Brotherhood of Locomotive Engineers* v. *ICC*, 761 F.2d 714, 717, 723 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270 (1987).

2. This was also the Commission's interpretation of Section 11341(a) and, under *Chevron*, *supra*, the court of appeals was bound to respect it. The Commission clearly and succinctly stated its interpretation of Section 11341(a) in two recent rail cases before this Court.[6]

[6] In its Petition for a Writ of Certiorari at 14-15, *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792, Oct. Term, 1985, the Commission stated that, under § 11341(a), "the Commission's power to approve consolidations includes the power to approve transactions which require the negotiation of changes in working conditions and to establish the means by which negotiation of such changes shall be effected" and that "if the Commission does so, RLA processes for resolving labor problems arising directly out of the approved transactions are overridden by virtue of . . . Section 11341(a)." "Such a result is necessary because no activity by any party can be allowed to frustrate consummation of the transaction authorized by the Commission and the public interest in that transaction which the Commission's approval entails." Brief for the Interstate Commerce Commission at 20, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Execs' Ass'n*, No. 87-1589, Oct. Term, 1988.

The Commission has routinely applied this interpretation in its jurisprudence. *E.g.*, *Maine Central R.R.—Exemption from 49 U.S.C. 11342 and 11343*, Fin. Docket No. 30,532 (decision served Sept. 16, 1985), *aff'd mem. sub nom. Railway Labor Execs' Ass'n* v. *ICC*, 812 F.2d 1443 (D.C. Cir. 1987); *Denver & Rio Grande Western*

Early in its opinion, the court correctly cited *Chevron* for the proposition that judicial deference is inappropriate if "Congress has directly spoken to the precise question at issue" (*Chevron*, 467 U.S. at 842-43). Pet. App. No. 89-1027 at 11a. The court then proceeded to "strike out" in search of Congress' intent. *Id.* The court's search, however, revealed no "unambiguously expressed intent of Congress" (*Chevron*, 467 U.S. at 843) to exclude collective bargaining agreements from the scope of Section 11341(a) immunity. Pet. App. No. 89-1027 at 12a-19a. The most the court could say on this score was that Congress had never directly faced the question. *Id.* at 18a.[7]

Under *Chevron*, the court was then required to advance to the second step of analysis—namely, to determine whether the Commission's interpretation of Section 11341(a) was permissible. *Chevron*, 467 U.S. at 843.

R.R.—Trackage Rights—Missouri Pac. R.R., Fin. Docket No. 30,000 (Sub-No. 18) (decision served Oct. 25, 1983), *vacated on other grounds sub nom. Brotherhood of Locomotive Engineers* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd*, 482 U.S. 270 (1987).

The United States has interpreted § 11341(a) the same way. Brief for the Interstate Commerce Commission and the United States of America at 24, *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792, Oct. Term, 1985 ("Section 11341(a) automatically confers an exemption of sufficient breadth to permit implementation of the authorized transaction"); Brief for the United States as *Amicus Curiae* at 9 n.8, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Execs' Ass'n*, No. 87-1589, Oct. Term, 1988.

[7] We submit that the court of appeals erred when it concluded that Congress had not spoken directly to the issue in enacting § 11341(a). As we have shown (*see supra* at 3-5), the language of the statute is clear, and it is equally clear that Congress intended to immunize carriers not merely from positive enactments, but from all restraints, limitations and prohibitions of law.

Instead of doing so, however, the court simply supplied its judgment regarding the meaning of Section 11341(a).[8]

[8] Further, contrary to the court of appeals' belief, the legislative history of the Transportation Act of 1920 does not support its interpretation of § 11341(a). While Congress was undoubtedly concerned with protecting carriers from the Clayton Act and certain state statutes, it chose immunity language broadly covering "all restraints, limitations, and prohibitions of law." *See supra* n.3. Moreover, Title III of the 1920 Act provided for comprehensive regulation of collective bargaining for the rail industry, and Congress did *not* exempt that Title from the 1920 Act's public interest regulation or its immunity provision. The lack of such exemption is especially significant because Congress expressly provided that at least two other sections of the 1920 Act *were* exempt from these provisions. *See* § 400 of the Transportation Act of 1920, ch. 91, 41 Stat. 456, 474-75 (amending § 1 of the ICA so as not to apply to interstate activities and certain water carrier activities); § 402 of the Transportation Act of 1920, ch. 91, 41 Stat. 456, 476-78 (amending § 1 of the ICA so as not to apply to spur and industrial tracks).

Moreover, when Congress enacted the RLA in 1926, it did not exempt labor matters from the ICC's delegated powers under current §§ 11343 and 11344 and the immunity from all other law under current § 11341(a). Finally, in 1933 Congress enacted the Emergency Railroad Transportation Act ("ERTA"), ch. 91, 48 Stat. 211. Title I of ERTA was temporary legislation limited to a one-year period, and contained a savings clause for RLA rights and labor contracts: "nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." 48 Stat. at 215. Title II of ERTA restated current § 11344 of the ICA, with the same public interest standard for approval of control transactions, and continued current § 11341(a) immunity. Unlike Title I, however, Title II contained no RLA or collective bargaining agreement savings clause. If Congress had intended to remove the RLA and collective bargaining agreements from §§ 11343 and 11344 public interest regulation and § 11341(a) immunity, it would have extended the Title I savings clause to Title II. Its decision not to do so reflects "an intentional distinction." *Texas* v. *United States*, 292 U.S. 522, 534 (1934).

While the court of appeals did not specifically explain its refusal to address the second part of the *Chevron* test, it suggested that deference was not warranted because it believed the Commission had previously interpreted the statute differently. Pet. App. No. 89-1027 at 13a (citing *Gulf, Mobile & Ohio R.R.—Abandonment*, 282 I.C.C. 311, 335 (1952)); *id.* at 22a-23a. But as Justice Scalia recently explained, "there is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind. *** [T]here seems to me no reason to value a new interpretation less than an old one." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517, 518 (1989). Moreover, the court of appeals was not correct that the Commission had changed its mind. The *Gulf, Mobile* case was a line abandonment case, not a control transaction, and Section 11341(a) was therefore not at issue.[9]

At all events, the Commission's interpretation of Section 11341(a) was permissible and thus entitled to deference.[10] In addition to the plain language of the statute

[9] If anything, *Gulf, Mobile* is consistent with the Commission's longstanding interpretation of Section 11341(a). The Commission held that it could not override contracts in abandonment cases absent "a clear grant of statutory authority similar to that contained in [§ 11341(a)]." 282 I.C.C. at 335.

[10] Despite its longstanding interpretation of § 11341(a), the Commission has stated that it does not "dispute the validity" of the court of appeals' decision. *Brandywine Valley R.R.—Purchase—CSX Transp., Inc.*, 5 I.C.C.2d 764, 772 n.5 (1989). We assume that this statement simply reflects the Commission's intent to comply, as it must, with the court of appeals' decision on the basis of law of the case and *stare decisis* principles, and does not reflect Commission approval of the court of appeals' interpretation of § 11341(a).

The Commission's present position in no way moots the issue in these cases. Indeed, the Commission's apparent acquiescence is itself a compelling reason for this Court to review the decision below: if the ICC is allowed to acquiesce, the decision below will become the law of the land, thus "overruling" this Court's decision in *Schwabacher, supra*.

(and its predecessor version), the numerous decisions of this Court holding that the ICA preempts state common law and private rights based on common law support the Commission's interpretation of Section 11341(a).

Moreover, the primary goal of the ICA since enactment of the Transportation Act of 1920 has been to encourage and facilitate control transactions in order to promote efficiency and strengthen the railroad economy. S. Rep. No. 1182, 76th Cong., 3d Sess. Pt. 1, 1 (1940) (Transportation Act of 1920 was designed to "encourage[] mergers and consolidations of railroad companies, under the supervision of the Interstate Commerce Commission, in the hope of bringing about a stronger national railroad economy"); *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958) (Transportation Act of 1940 was designed "to facilitate merger and consolidation in the national transportation system"); *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2596-97 (1989) (Railroad Revitalization and Regulatory Reform Act of 1976 and Staggers Act of 1980 were "aimed at reversing the rail industry's decline through deregulatory efforts, above all by streamlining procedures to effectuate economically efficient transactions"). The Commission's interpretation of Section 11341(a) is consistent with and promotes this goal.

Finally, Congress has given the Commission exclusive and plenary jurisdiction over control transactions. Section 11341(a) states that the ICC's power over control transactions "is exclusive." The enacted version of Section

11341(a), which was recodified without substantive change (*see supra* n.3), stated that the ICC's power over such transactions "shall be exclusive and plenary." This Court has recognized that the ICC has "plenary authority over rail transportation" (*Pittsburgh & Lake Erie R.R.*, *supra*, 109 S. Ct. at 2596) and that Congress has delegated to the ICC the power to accommodate public and private interests in control transactions (*United States* v. *Lowden*, 308 U.S. 225, 234-38 (1939)). The Commission's exclusive and plenary jurisdiction in this area is a compelling reason to defer to its interpretation.

3. Congress has ensured that the interests of railroad employees remain fully protected notwithstanding Section 11341(a). Since this Court's decision in *Lowden*, *supra*, it is clear that the Commission must consider employee interests as part of its public interest determination in control transactions. *See also* 49 U.S.C. § 11344(b)(1). Moreover, under Section 11347 of the ICA, 49 U.S.C. § 11347, the Commission is required to impose minimum conditions in favor of railroad employees in *every* control transaction. The Commission must require the carriers to provide employees with a "fair arrangement" adequately protecting their interests. The minimum conditions the ICC must impose include six years of wage and benefit guarantees and seniority adjustment procedures. The Commission, of course, may impose additional conditions in favor of employees. Finally, immunity is accorded only when necessary to enable the participating carriers to carry out the transaction as approved by the ICC.

4. The court of appeals' decision is contrary to this Court's decision in *Schwabacher, supra*. *Schwabacher* involved the merger of the Pere Marquette Railway with another carrier. A group of dissenting Pere Marquette

shareholders claimed that under the Pere Marquette charter, a contract enforceable under Michigan law, they were entitled to receive a certain amount for each share of stock; they challenged the merger because it provided them substantially less than that amount and thereby deprived them "of contract rights under Michigan law." *Schwabacher*, 334 U.S. at 188. The ICC approved the proposed merger, but stated that the dissenting shareholders could pursue their contract claim in state court. *Id.*

This Court rejected the ICC's approach. Relying on Section 11341(a), the Court held that once the Commission approved the merger, the new entity was relieved of any claims based on contract rights allegedly conferred by the Pere Marquette charter. *Id.* at 194-95, 201-02.[11] *See also ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 298 (1987) (Stevens, Brennan, Marshall and Blackmun, JJ., concurring) ("[t]he breadth of the [Section 11341(a) immunity] is defined by the scope of the approved transaction"). Following *Schwabacher*, every court of appeals that has addressed the issue (except for the court below) has held that the immunity provision at issue in these cases immunizes carriers participating in an ICC-approved transaction from any obligations they would

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[11] According to the court of appeals, *Schwabacher* stands only for the proposition that the "ICC may override state law granting dissenting shareholders [the] right to block [a] merger." Pet. App. No. 89-1027 at 21a. *Schwabacher* is not so limited. Michigan law did not give shareholders any substantive rights. Rather, those rights were provided contractually by the Pere Marquette charter. Michigan law simply provided that, in the case of a merger, any preexisting obligations of the merging companies (e.g., contractual obligations) attached against the new corporation. *See* Pet. No. 89-1027 at 12-13 & n.15.

otherwise have under the RLA or collective bargaining agreements, when such immunity was necessary to let them carry out the transaction.[12]

5. These cases are of great importance to the rail industry. Rail carriers face vigorous competition, not only from each other but also from other modes of transportation. To meet that competition, rail carriers have continually strived to make themselves more competitive—and their services more attractive to consumers—through control transactions, which enable them to improve efficiency by eliminating duplicative facilities. Rail carriers have planned and undertaken their activities and investments on the assumption, grounded in the ICA and relevant case law, that if efficiency and the public interest require control transactions, Section 11341(a) immunity would allow them to implement and achieve the efficiencies and other public interest benefits envisioned by the ICC when it approves the transaction, free from the impediments imposed by legal obstacles (including collective bargaining agreements) when such immunity is necessary.

Under the decision below, however, rail carriers may, in effect, first have to obtain the consent of railway labor before engaging in control transactions that could affect collective bargaining agreements. Unless the Section

[12] *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry.*, 314 F.2d 424, 431-32 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); *Boston & Maine Corp.*, *supra*, 788 F.2d at 800; *Nemitz* v. *Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971); *Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107, 111-12 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987); *Burlington Northern, Inc.* v. *American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 975 (1975).

11341(a) immunity encompasses all legal obstacles as necessary to carry out approved control transactions, railway labor will have veto power over control transactions that the ICC has found to be in the public interest but that might affect collective bargaining agreements.[13] The Commission itself has recognized this danger.[14]

The decision of the court of appeals thus threatens to frustrate achievement of the public interest benefits of approved control transactions and deter future control transactions designed to make rail transportation even more competitive and beneficial to the consumer: rail carriers are far less likely to enter into control transactions if railway labor need merely assert collective bargaining rights to prevent the very changes motivating the transactions and making them in the public interest. In short, the decision below may chill a broad range of efficiency-enhancing control transactions, thereby inhibiting

[13] Absent § 11341(a), if railway labor does not consent to an implementing change, the matter proceeds to negotiation pursuant to the procedures of the RLA. But, as this Court has recognized, the RLA procedures "are purposely long and drawn out" (*Brotherhood of Ry. & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246 (1966)), and thus effectively preclude carriers from carrying out the transaction if labor does not consent at the outset.

[14] Brief for the Interstate Commerce Commission at 34, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Execs' Ass'n*, No. 87-1589, Oct. Term, 1988:

> Any determination by the Commission that labor protections are not appropriate to a rail transaction becomes purely advisory if the transaction is subject to the RLA. Any rail transaction is henceforth subject to a rail labor veto with the invocation of the RLA. The Commission's determination about the public interest with respect to the transaction which is required to take into account among other things the interests of rail employees becomes a nullity.

rail carriers' ability to compete, all to the ultimate detriment of the consumer.

6. Despite their longstanding interpretation of Section 11341(a) and the Commission's numerous decisions giving effect to that interpretation (*see supra* n.6), the federal respondents urge the Court to deny as "premature" the petitions for writs of certiorari in these cases. Brief for the Federal Respondents in Opposition at 11. The federal respondents assert that "the Commission is presently exploring a variety of alternative bases . . . for allowing approved consolidations to go forward without resort to the extended bargaining procedures required by the RLA" and that "[i]t is entirely possible that the Commission will adopt a position on one or more of these alternatives that may obviate the difficulties entailed by the court of appeals' decision. *** Thus, the Commission's ultimate disposition of the case on remand may not be affected by the court of appeals' present decision." *Id.* at 11-12.

Contrary to the assertion of the federal respondents, the Commission's proceedings on remand will not obviate the need for review of the question presented. In a February 9, 1990 voting conference in this matter, the Commission made clear that it does not intend to dispute or challenge the court of appeals' interpretation of Section 11341(a) in its decision on remand. Transcript of Voting Conference at 14-15, 63-65, 74-75, *CSX Corp.—Control—Chessie System, Inc.*, Finance Docket No. 28,905 (Sub-No. 22) (Feb. 9, 1990). Proceedings on remand will therefore add nothing to the existing record with regard to the question presented by the instant petitions.

Moreover, the Commission's decision on remand will address issues relating only to labor. *Id.* But the court of

appeals' decision may be applied not only to collective bargaining agreements, but also to other private contracts. The Commission's decision on remand will not affect this important aspect of the decision below.

Thus, the question presented by these petitions is now ripe. Nothing can be gained from further delay. Without prompt review of the judgment, corporate planning decisions will be significantly disrupted and the resulting uncertainty will adversely affect the public interest. *See supra* at 2, 12-14.[15]

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted,

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Dated: February 28, 1990

[15] We submit that, even if this Court were to accept the federal respondents' invitation to wait until completion of the proceedings on remand (along with appellate review of such proceedings), it should not deny the petitions in these cases. Rather, it should defer their consideration so that it may consider the question they present at the same time it considers the issues presented by the remand proceeding.

Nos. 89-1027 and 89-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK & WESTERN RAILWAY COMPANY and SOUTHERN RAILWAY COMPANY,
Petitioners,
v.
AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
Respondents.

CSX TRANSPORTATION, INC.,
Petitioner,
v.
BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION TO DISMISS

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Date: May 24, 1990

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Supreme Court of the United States
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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION TO DISMISS

Come now American Train Dispatchers' Association and Brotherhood of Railway Carmen, [hereinafter, "union

respondents"], and respectfully move, pursuant to Rule 21, that the Writs of Certiororai entered herein be dismissed as the issue presented in those Writs has been rendered moot by recent actions of the Interstate Commerce Commission [hereinafter, "Commission" or "ICC"] in these cases which are now pending before it on remand from the United States Court of Appeals for the District of Columbia Circuit. Alternatively, the Writs should be dismissed as no longer presenting an important question of federal law which should be settled by this Court.

BACKGROUND OF MOTION

These cases resulted from appeals to the United States Court of Appeals for the District of Columbia Circuit from orders of the Commission affirming arbitration awards issued pursuant to ICC conditions attached to orders approving separate railroad control and merger cases involving the railroad petitioners herein.

Union respondents contended that the arbitrators, and the Commission in affirming their awards, had exceeded the statutory authority provided by the Congress in the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.*, particularly sections 11341(a) and 11347 of that Act. The union respondents also contended that the ICC had applied an improper standard in reversing that part of the award in the *Carmen*'s case which had been in favor of the Carmen and, in the *Dispatcher*'s case, the Commission had deprived employees of their rights in violation of Section 2 Fourth of the Railway Labor Act, 45 U.S.C. § 152 Fourth.

The Court of Appeals ruled that because "§ 11341(a) of the Act does not grant the ICC its claimed power to override the provisions of a CBA [collective bargaining agreement] between a carrier and its employees", the ICC's decisions should be reversed and remanded with respect to the ICC's Railway Labor Act holdings "in order that the agency may determine whether further pro-

ceedings are necessary". (Petitioners' Appendix at 26a in No. 89-1028.) The court did not rule on the other issue presented to it.

The railroad petitioners herein filed petitions for rehearing with the Court of Appeals with suggestions for rehearings *en banc*. The petitions were denied (No. 89-1028, App. at 30a, 31a). The Commission filed a petition for rehearing on which consideration by the court was deferred pending release of the ICC's decision on remand (*id.* at 32a). That petition is still pending.

Following remand to it, the full Commission ordered argument by all parties to be held on January 4, 1990, on the question of ICC authority under the Act, particularly section 11347 thereof. The Commission had stated in a decision in another case issued soon after the Court of Appeals' decision had issued that it did not dispute the validity of the holding of the court in the instant cases and, indeed, claimed never to have relied upon its authority under § 11341(a) to override contracts while conceding that it had "been less than precise in articulating . . . [that] authority." *Brandywine Valley Railroad Company-Purchase-CSX Transportation, Inc., Lines in Florida*, 5 I.C.C.2d 764, 772 n.5 (1989).

On or about December 27, 1989, the petitioners filed their petitions for writs of certiorari to the Court of Appeals. These petitions were opposed by the ICC, the United States [1] and the union respondents as premature. This Court granted the petitions on March 26, 1990.

On February 9, 1990, the Commission held an open voting conference on the cases remanded to it, voted to reaffirm its authority under Section 11347 to override collective bargaining agreements and instructed its staff to prepare a written decision in accordance with its vote and its oral discussion of the cases.

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[1] The United States declined to take a position in either case before the Court of Appeals.

At a May 15, 1990 open voting conference involving a number of cases, the Commission voted unanimously to adopt its staff's sixty-page written decision on remand and to release the decision to the public as soon as it had been readied for distribution.

On May 17, 1990, the Commission published a news release announcing the results of the May 15, 1990 voting conference. According to the news release, a copy of which is appended to this motion, the Commission is taking a "new approach" to the issues before it in these cases and in "light of the new approach stated in its decision [not yet released], the Commission reversed and vacated the two arbitration awards under review in these cases and remanded them for further negotiation by the involved parties and for consideration by arbitrators if necessary in accordance with the decision."

ARGUMENT

The case before this Court arose from two Commission decisions affirming two arbitration awards. The Commission on remand from the Court of Appeals has now, according to its news release, reversed and vacated those same arbitration awards and remanded the cases to the petitioner railroads and union respondents for further negotiation and later consideration by arbitrators, if necessary. This action of the ICC has effectively mooted the issue before this Court as to all parties. *Cf. Piccirillo v. New York*, 400 U.S. 548, 549 (1971).

The Commission indicates that it had determined from a study of the relationship between the Interstate Commerce Act and the Railway Labor Act over the past 50 years and in accordance with the practice between 1940 and 1980 growing out of the Washington Job Protection Agreement, that "collective bargaining agreements could be modified under 49 U.S.C. 11347 and the ICC's employee-protection conditions, but only with respect to the selection of work forces and the assignment of employees

—with some qualifications—and only to the extent necessary to permit the carrying out of a merger or consolidation". The Commission also concludes that "[e]mployees' contract rights are otherwise to be preserved and their traditional right to bargain over rates of pay, *rules*, and *working conditions* is not to be undermined". (Emphasis supplied.)

The Commission evidently has determined that regardless of what may be this Court's ruling on the issue pending before it, it is section 11347, not section 11341(a), that governs and restricts its actions in merger and control cases with regard to employees' contract and Railway Labor Act rights.

This "new approach", in the Commission's words, has constrained it to reverse and vacate the arbitration awards which it had previously affirmed and remand the cases for negotiations between the respective railroad and union parties. If the parties are unable to resolve their differences by negotiation, arbitration will be ordered. However, those negotiations and that arbitration will be conducted against the background of the ICC's "new approach" to the goveranance and restrictions of section 11347.

The existing differences between the railroad petitioners and union respondents may be eliminated by negotiations or arbitrations or review of the arbitrations by the ICC.[2] If not, the pending Commission petition for rehearing before the Court of Appeals could be reactivated. In any event, the issue of the meaning and effect of section 11341(a) is no longer material to the pending disputes which, if they remain unresolved, will again be before this Court on the issue of the Commission's authority under section 11347. Finally, it is this new approach of Commission reliance on section 11347, instead

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[2] Any existing differences between union respondents and respondent ICC involving the effect of section 11341(a) upon collective bargaining agreements were eliminated when the ICC issued its *Brandywine* decision, *supra*, page 3.

of section 11341(a), that will govern all future railroad merger and control cases arising under the Intertsate Commerce Act, unless changed by a future ruling of this Court on a future review of these actions of the ICC.

Additionally, even were one to conclude that the recent actions of the Commission have not rendered wholly academic the issue of the effect of section 11341(a) as authority to override collective bargaining agreements, those actions certainly have drained the cases as currently presented to this Court of any general importance for future railroad merger and control cases approved pursuant to the Interstate Commerce Act. *Cf. Triangle Improvement Council, et al. v. Ritchie, et al.*, 402 U.S. 497, 499 (1971).

CONCLUSION

For these reasons, union respondents respectfully submit that the issue now before this Court on writs of certiorari has been rendered moot by the recent actions of the Commission or, at the least, has lost any stature as an important question of federal law that this Court should decide and that the writs now should be dismissed.

Respectfully submitted,

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Date: May 24, 1990

APPENDIX

APPENDIX

INTERSTATE COMMERCE COMMISSION
ICC NEWS
12th & Constitution Avenue N.W.
Washington, D.C. 20423

FOR RELEASE
Thursday, May 17, 1990
No. 90-67

Contact: Dennis Watson
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ICC ISSUES RESULTS OF MAY 15
VOTING CONFERENCE

Interstate Commerce Commission Chairman Edward J. Philbin has announced the results of the Commission's May 15 voting conference in several railroad cases.

The cases and respective voting results are described in the sequence in which they were considered and voted upon by the Commission.

• Finance Docket No. 31532, *Indiana Hi-Rail Corporation—Lease and Operation Exemption—Norfolk and Western Railway Company Line Between Douglas, OH and Van Buren, IN*, involving the issue of whether the Commission should grant Indiana Hi-Rail Corporation's petition for reconsideration of a 1989 Commission order denying Indiana Hi-Rail's request for exemption from the ICC's tariff-filing and reporting requirements. The Commission, voted to postpone action on the petition until Indiana Hi-Rail provides additional information.

• Docket No. AB-12 (Sub-No. 118X), *Southern Pacific Transportation Company—Exemption—Abandonment of Service in San Mateo County, CA*, involving the issue of whether a 1989 Commission Notice of Interim Trails Use should be revoked for an approximately 1.2-mile segment of the Southern Pacific "Ravenswood Branch" line in San Mateo County, California. The Commission voted to (1)

consider petitions of the National Association of Reversionary Property Owners and Mr. Horace Robertson seeking administrative review or reconsideration of the ICC's 1989 decision; (2) seek additional information to determine whether the segment in question is a "spur" track which falls outside the Commission's abandonment jurisdiction; and, (3) explore whether or not abandonment has been consummated in this instance.

• Docket No. AB-263 (Sub-No. 2X), *Staten Island Railway Corporation—Abandonment Exemption—In Richmond County, NY*, involving the Staten Island Railway's request for an exemption from the Commission's prior-approval regulations for the abandonment of its 3.65-mile "Travis Branch" line in Richmond County, New York. The Commission voted to grant the exemption.

• Ex Parte No. 346 (Sub-No. 26), *Association of American Railroads—Petition to Exempt Industrial Development Activities from 49 U.S.C. 10761(a), 10762 (a)(1), 11902, 11903, and 11904(a)*, involving the issue of whether the Commission should issue a notice of proposed rulemaking requesting public comment on the Association of American Railroad's (AAR) petition for a limited exemption from the anti-rebating (Elkins Act) provisions of the Interstate Commerce Act to permit railroads to engage in certain market development activities. The Commission voted generally to accept the AAR's petition for purposes of initiating an advance notice of proposed rulemaking that would include participation by the public, the U.S. Department of Justice, and the Commission's Office of Compliance and Consumer Assistance.

• Finance Docket No. 28905 (Sub-No. 22), *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, and Finance Docket No. 29430 (Sub-No. 20), *Norfolk Southern Corporation—Control—Norfolk and Western Railway Company and Southern Railway Company*, involving issues on "remand" (that is, issues for reconsideration) by the U.S. Court of Appeals for the District of Columbia Circuit.

The Commission voted to issue a decision reviewing the relationship between the Interstate Commerce Act and the Railway Labor Act in connection with the treatment of employees in mergers and consolidations over the past 50 years. The decision balances the railroads' need to expect prompt consummation of ICC-approved transactions and the rights of employees to bargain collectively over their terms of employment. The Commission ruled that, in accord with the practice between 1940 and 1980 growing out of the Washington Job Protection Agreement, collective bargaining agreements could be modified under 49 U.S.C. 11347 and the ICC's employee-protective conditions, but only with respect to the selection of work forces and the assignment of employees—with some qualifications—and only to the extent necessary to permit the carrying out of a merger or consolidation. Employees' contract rights are otherwise to be preserved and their traditional right to bargain over their pay, rules, and working conditions is not to be undermined.

In light of the new approach stated in its decision, the Commission reversed and vacated the two arbitration awards under review in these cases and remanded them for further negotiation by the involved parties and for consideration by arbitrators if necessary in accordance with the decision.

• Finance Docket No. 31530, *Wilmington Terminal Railroad, Inc.—Purchase and Lease—CSX Transportation, Inc. Lines Between Savannah and Rhine, and Vidalia and Macon, GA*, involving a request for Commission approval for Wilmington Terminal Railroad's purchase and lease from CSX of two connected rail lines—totaling approximately 224 miles—between Savannah and Rhine and Vidalia and Macon, Georgia, and the question of what type of labor-protective conditions should be imposed on the transaction.

Here, the Commission's vote clarified the obligation of buyers and sellers of railroad lines to protect and negotiate with employees affected by a line sale. In so doing, a majority of the Commission eliminated the obligation of a buyer to negotiate an implementing agreement with the employees of the seller, an obligation which had been imposed by the Commission for the first time in Finance Docket No. 31393, *Brandywine Valley R.R. Co.—Purchase—CSX Transp., Inc., Lines in Florida*, 5 I.C.C.2d 764 (1989). This clarification, based on a study of the Commission's past approach to labor protection in lines sales, requires the seller to negotiate with affected employees an implementing agreement to reflect diminished work and afford them full protection, with no penalty for failure to take any position offered by the buyer. The buyer would be required to negotiate an implementing agreement with its employees, and to discuss—but not to negotiate—with the seller's employees the basis on which the buyer would be willing to offer positions to the seller's employees.

If these requirements are followed, the Commission was of the view that implementation of the transaction would not be inconsistent with any rights or obligations to negotiate arising under the Railway Labor Act (RLA), since no collective bargaining agreements are modified. As a result, a majority of the Commission found no need at this time to issue a declaration sought by CSX to the effect that any rights to negotiate which might be believed to arise from the rail unions' service of Section 6 notices would be overridden under the provisions of 49 U.S.C. 11341(a) as a result of the Commission's approval of the transaction under Section 11344 of the Interstate Commerce Act. The rail unions have served Section 6 notices on all of the railroads collectively, and some carriers individually, including CSX, seeking to modify existing collective bargaining agreements to require a selling carrier to include in contracts of sale a provision that the purchaser would take on existing em-

ployees, collective bargaining agreements, and union representation.

The Commission also found that it was not required by Section 11347 of the Interstate Commerce Act or its own conditions to require a purchaser to assume the seller's employees, collective bargaining agreements, and union representation, as contended by certain rail labor parties. The Commission further found that no basis had been shown for imposing a preferential hiring requirement on Wilmington Terminal in this case as a matter of its own discretion. Commissioner Lamboley would have imposed a preferential hiring requirement.

The Commission did not vote in the May 15 conference on Docket No. 37626, *Consolidated Papers, Inc., et al.* v. *Chicago and North Western Transportation, et al.*, involving the issue of whether the defendant railroads have market dominance over the transportation of pulpwood and wood chips from Michigan, Minnesota, South Dakota, Wyoming, Colorado, and Montana to the midwestern mills of four Wisconsin paper manufacturers. The Commissioners instead voted by "notation" (registering their votes on paper) on several technical issues. A summary reflecting that vote was issued May 15.

Nos. 89-1027 and 89-1028

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Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT APPENDIX

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NOTATION REGARDING ITEMS PREVIOUSLY REPRODUCED

The opinions, decisions, judgments, and orders indicated below have been omitted in printing this joint appendix because they appear, at the pages indicated below, in the appendix to the printed Petition For A Writ of Certiorari in case number 89-1027 and/or in the separately bound appendix to the printed Petition For A Writ of Certiorari in case number 89-1028.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

American Train Dispatchers' Association v. ICC, et al., No. 88-1694, United States Court of Appeals for the District of Columbia Circuit

09-20-88 Original Proceedings Transferred from the USCA for the Eleventh Circuit.

10-27-88 Petitioner's motion to consolidate cases 88-1694 and 88-1724.

11-25-88 Per Curiam order that the motion to consolidate cases 88-1694 and 88-1724 is denied. The Clerk is directed to schedule these cases for oral argument on the same date and before the same panel. The Clerk is directed to file a copy of this order in both cases. Mikva, Buckley and D. H. Ginsburg, CJs.

04-17-89 Per Curiam order granting intervenors' motion for leave to participate in oral argument. Intervenors shall have 5 of respondent's 15 minutes for argument.

04-25-89 ARGUED before Chief Judge Wald, Edwards and D. H. Ginsburg, CJ's.

07-25-89 Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

07-25-89 ~~Judgment by this Court that the petition for review is granted in part and the case is remanded, in accordance with the Opinion for the Court filed herein this date.~~ Inadvertently entered. See order of 9/29/89.

07-25-89 Mandate order.

09-08-89 INTERVENORS' petition for rehearing and suggestion of rehearing *en banc*.

09-08-89 Petition of Interstate Commerce Commission for rehearing.

09-29-89 Per Curiam order that the opinion of the Court filed July 25, 1989 is amended.

09-29-89 Per Curiam order that the petitions for review are granted in part and the records herein are remanded to the Commission for further proceedings, in accordance with the Opinion of the Court filed herein this date. PMW, HTE, DHG.

09-29-89 Per Curiam order that the Clerk is directed to file petitioners' lodged response to the petition for rehearing. Further ordered that consideration of the petition for rehearing is deferred pending release of the ICC's decision on remand. PMW, HTE, DHG.

09-29-89 Per Curiam order that the suggestion for rehearing *en banc* is denied.

09-29-89 Per Curiam order that the petitions for rehearing are denied. PMW, HTE, DHG.

01-08-90 Notice from the Supreme Court of filing of petition for certiorari.

03-27-90 Letter from Clerk's Office, US Supreme Court, forwarding certified copy of 3/26/90 Supreme Court Order allowing certiorari (S.Ct. No. 89-1027, consolidated with 89-1028). 1 hour allotted for oral argument (DC Cir. Nos. 88-1694 and 88-1724).

03-27-90 Letter from Clerk's Office, US Supreme Court, forwarding certified copy of 3/26/90 Supreme Court Order allowing certiorari (S.Ct. No. 89-1028, consolidated with 89-1027). 1 hour allotted for oral argument (DC Cir. Nos. 88-1694 and 88-1724).

Brotherhood Railway Carmen v. ICC, et al., No. 88-1724, United States Court of Appeals for the District of Columbia Circuit

10-05-88	Original Proceedings Transferred from the USCA for the Eleventh Circuit.
10-27-88	Petitioner's motion to consolidate cases 88-1694 and 88-1724.
11-25-88	Per Curiam order that the motion to consolidate cases 88-1694 and 88-1724 is denied. The Clerk is directed to schedule these cases for oral argument on the same date and before the same panel. The Clerk is directed to file a copy of this order in both cases. Mikva, Buckley and D. H. Ginsburg, CJs.
04-17-89	Per curiam order granting the motion of CSX for leave to participate in oral argument. Intervenor CSX shall have 5 of respondent's 15 minutes for argument.
04-25-89	ARGUED before Chief Judge Wald, Edwards and D. H. Ginsburg, CJ's.
07-25-89	Opinion for the Court filed by Circuit Judge D. H. Ginsburg.
07-25-89	~~Judgment by this Court that the petition for review is granted in part and the case is remanded, in accordance with the Opinion for the Court filed herein this date.~~ Inadvertently entered. See order of 9/29/89.
07-25-89	Mandate order.
09-08-89	Petition of Intervenor CSX Transportation, Inc. for rehearing and suggestion for rehearing *en banc*.
09-08-89	Petition of Interstate Commerce Commission for rehearing.

09-29-89	Per Curiam order that the opinion of the Court filed July 25, 1989 is amended.
09-29-89	Per Curiam order that the petitions for review are granted in part and the records herein are remanded to the Commission for further proceedings, in accordance with the Opinion of the Court filed herein this date. PMW, HTE, DHG.
09-29-89	Per Curiam order that the Clerk is directed to file petitioners' lodged response to the petition for rehearing. Further ordered that consideration of the petition for rehearing is deferred pending release of the ICC's decision on remand. PMW, HTE, DHG.
09-29-89	Per Curiam order that the suggestion for rehearing *en banc* is denied.
09-29-89	Per Curiam order that the petitions for rehearing are denied. PMW, HTE, DHG.
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Pursuant to Article I Section 4, N.Y. Dock II, Conditions – ICC Finance Docket No. 29430 (366 I.C.C. 171)

In the Matter of Arbitration

between

Norfolk and Western Railway Co.
Southern Railway Company

and

American Train Dispatchers Assn.

DECISION AND AWARD

Appearances

For the Carriers
Jeffrey S. Berlin, Esquire
Richardson, Berlin & Morvillo

William P. Stallsmith, Jr., Esquire
Norfolk Southern Corporation

For the Organization
William G. Mahoney, Esquire
Highsaw & Mahoney, P.C.

Appointment

On March 19, 1982, the Interstate Commerce Commission (ICC) approved the application of Norfolk Southern (NS) to obtain control of the separate railroad systems of Norfolk & Western (N&W) and Southern Railroad (Southern) under Finance Docket No. 29430 (Sub.-No. 1). Included in the approval order was the requirement that New York Dock II Conditions apply.

On September 12, 1986, pursuant to New York Dock II conditions and the ICC order, N&W notified the American Train Dispatchers Association (ATDA) that it intended to transfer the work of supervising the locomotive power distribution and assignment from the N&W System Operations Center in Roanoke, Virginia, to Southern's Control Center in Atlanta, Georgia. Thereafter, the parties engaged in negotiations on October 7, 27, 28, and November 10 and 11, 1986, and were unable to reach agreement upon an implementing agreement. Unable to reach agreement upon a neutral referee, on December 4, 1986, N&W requested the National Mediation Board to appoint a neutral and by letter December 9, 1986, Robert O. Harris was nominated to sit as the neutral. The Carriers named R. S. Spenski, Assistant Vice President - Labor relations, as its member of the panel and the Organization designated H. E. Mullinax, Vice President, as its member. On May 13, 1987, the neutral and Carrier members of the panel were informed by R. J. Irvin, President of the American Train Depatchers Association that due to the unavailability of Vice President Mullinax on the scheduled date for an executive session of the panel, "I am appointing Mr. W. G. Mahoney to replace Mr. Mullinax as our member of the arbitration board."

The parties submitted pre-hearing briefs, a hearing was held on February 27, 1987, in Roanoke, Virginia, and the parties then submitted post-hearing briefs. The panel has met twice in executive session and the matter is now ready for decision.

Background

The N&W was itself formed as the result of several mergers in the 1960's. ATDA had agreements with each of the railroads which had merged into N&W. The agreements contained scope language which stated that the Assistant Chief Train Dispatcher would "supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work." Accordingly, the Assistant Chief Train Dispatchers issued instructions to mechanical department personnel regarding the number and identity of locomotives to be used on trains originating at their respective terminals. ATDA did

not represent Train Dispatchers on the original N&W. Following the merger the N&W "power bureau" assumed responsibility for all of the merger carriers and the ATDA represented dispatchers were no longer assigned the work in question. ATDA appealed this assignment and the Third Division of the National Railroad Adjustment Board issued an award which sustained the position of ATDA. Thereafter, an agreement was reached between N&W and ATDA that the supervisors who worked out of the "power bureau" would be represented by ATDA.

The Southern, which controls its distribution of power out of Atlanta, utilizes Superintendents of Transportation, who are nonagreement officers. It has done so for at least 22 years with such personnel.

Facts

After the merger, Norfolk Southern determined to consolidate all of the control functions for the entire system in one location. Mr. J.R. Martin, Senior Assistant Vice President, Transportation Planning, of the Southern testified that Atlanta was chosen and that all of the control functions involved in the movement of cars and the assignment of costs when other railroads utilize NS tracks already have been transferred to the control center there. The only remaining consolidation is the one involved in this dispute, the assignment of locomotive power. Mr. Martin indicated that a single control center would effect efficiencies in the utilization of motive power of about one per cent. With 2,200 locomotives, this would mean 22 less locomotives would be needed, a saving of $26 million in capital investment and a saving of $2 million a year in operating expenses. This does not include savings in labor cost which would be realized. Mr. Martin further testified that because the two systems were operated separately the accounting functions were carried in the same manner as if they were independent companies and locomotives

were only transferred between the railroads in large batches rather than singly.

Mr. H. H. Bradley, Assistant Vice President of Transportation of the Southern, testified that he was in charge of the Control Center in Atlanta. He described the job of Superintendent of Transportation - Locomotive (STL) as follows:

> The STL when he comes on duty would discuss with the off-going STL anything unusual that has occurred during the prior eight hours of an exceptional type nature.
>
> He would then start pulling up his screens on the CRT looking at inventories of locomotives at the major hump yards where the majority of the engines are located. These are electronic hump yards. They look at the inventory and see if there is anything unusual. The STL would know the schedules of the trains for which he has to provide locomotives.
>
> We have an operating plan over the system, and in a normal situation the locomotives cyclicly move from one train to another train to another train and then complete the cycle. And he would have to look for exceptions, if he had a mechanical failure. And then he would have to supply another locomotive.
>
> Then he looks and starts talking with the Chiefs in addition to a tonnage report he has available to see if we have any unusual amount of traffic. He looks to see if there have been any trains annulled that are not to be operated, that have provided extra power, or there may be a problem where there is no power at the end of a normal run, if the train has been canceled.
>
> Looking at these by division, knowing his inventory and knowing the train schedules, he will actually assign locomotives by number into the CRT in many

cases. But that is done generally with discussion with the Shop Foreman who knows which engines have been serviced, which engines are on the fuel rack. He has some of this conversation to make sure that he minimizes his switching.

Mr. Bradley further indicated that at the present time the NS system is operated with two regions—Northern (N&W) and Southern (Southern). When consolidation takes place it will be possible to change this system and there is consideration being given to not only rationalizing the system between North and South—they are now generally divided but there are some anomalies because of the trackage of the two railroads—but also to having the system configured into East and West regions instead. He also indicated that he believes that each of the STL jobs should be interchangeable and that an individual should be able to shift from one region to another.

Mr. Bradley noted that the differences between the STL's and the System Operations Center (SOC) Supervisors are in the tools which the STL uses. Because the STL utilizes the CRT, he has the ability to communicate with other members of the railroad, while the SOC board is an informational system that is available only to the people standing in the SOC.

The pay of STL's is about ten percent higher than that of SOC Supervisors although it cannot be exactly compared because the benefit packages are different and each STL has his salary set by his manager. It may be different from any other STL's salary.

Contentions of the Parties

It is the position of the Organization that it has represented the SOC Supervisors who perform power distribution duties on the N&W under an agreement entered into April 1, 1971, and that the transfer of work involved

in this proceeding was not included within the list of jobs which the merged carrier intended to "abolish, create or transfer as a result of ICC approval of its application for joint control" in Finance Docket No. 29430 (Sub.-No. 1). It is the organization's position that the transfer of these jobs is not allowable under the ICC order and that the ICC and this Arbitration Panel have no authority to change wages, rules, or working conditions of employees which are protected by the Railway Labor Act and Section 11347 of the Interstate Commerce Act (49 USC 11347).

It is the Organization's second contention that even if its first contention is not agreed to, the ICC "has never claimed for itself the extraordinary statutory power to eliminate Railway Labor Act and collective bargaining agreement rights of entire classes of employees." It further contends that even if the ICC has such power, it could only be exercised where necessary to effectuate a transaction approved by the ICC and this transaction, the transfer of SOC employees, was never presented to the Commission for approval.

Finally, the Organization contends that this Arbitration Panel, created under the ICC's New York Dock II decision, "explicitly commands preservation of Railway Labor Act and collective bargaining agreement rights. Section 2 of Appendix I states:

> The rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges, and benefits (including continuation of pension rights and benefits) of a railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

The Organization states that even if one were to assume otherwise and also assume that the proposed SOC transfer had been presented to and approved by the ICC, that those

assumptions could not be used as a basis for the elimination of collective bargaining and Railway Labor Act rights because the continued existence of those rights does not subject the proposed SOC transfer "to the risk of nonconsummation as a result of the inability of the parties to agree on a new collective bargaining agreement" as required by the ICC decision in the *Maine Central* decision.

The Carriers contend that the Organization's procedural arguments are without merit. They state that the Arbitration Panel has authority under Section 4 of New York Dock II to fashion an implementing agreement. The Carriers further contend that the argument regarding Section 2 is without merit since recent ICC decisions have refuted the Organization's contention and decisions have been issued by various referees under the authority contained in the ICC decisions. The Carriers also contend that the rearrangement of forces which is the subject of this dispute is an appropriate rearrangement under the authority granted the Carriers by the ICC decision allowing their joint control.

Finally, the Carriers contend that the Implementing Agreement which they proposed is an appropriate basis for this rearrangement of forces.

Discussion

I.

As noted by the Organization, this is an unusual rearrangement of forces since it combines employees who have chosen to be represented for the purposes of collective bargaining with other employees who are not so represented. However, like all other New York Dock cases, the Panel must first look to its own authority to act.

As noted above, this proceeding is the result of a request by the Carriers in accordance with the ICC decision which allowed joint control of the Carriers. In its decision, the ICC (366 ICC 171, 230) stated:

> We find that the applicants' estimates of employee impact are reasonable. What dislocations there will be appear to be short term. It is possible that further displacement may arise as additional coordinations occur. However, no wholesale disruption of the carriers' work force should occur and the overall disruption is clearly not unusual in comparison to other rail consolidation transactions.

It noted further (366 ICC 171, 231):

> We find that the minimum statutory protection of *New York Dock* is appropriate for the protection of applicants' employees affected by this proceeding without any of the suggested modifications.

The basic questions, then, are whether the type of consolidation desired by the Carriers was authorized by the ICC in its decision and if it was, what are the protections afforded by New York Dock.

The Organization has contended that the consolidation of the Roanoke SOC with the Atlanta Control Center was not part of the original submission of the Carriers in which they listed the expected consolidations which would be made if the joint control was approved by the ICC. The Organization believes that only the actual consolidations specifically approved by the ICC were authorized; any other consolidation is outside the scope of the ICC decision. The language quoted above seems to belie that contention since it specifically states: "It is possible that further displacement may arise as additional coordinations occur." Had the ICC not believed that there would be additional coordinations, beyond those which had been listed in the submissions to it, it would not have needed to put that sentence into its decision. And having put it in, it must have had a reason—the general approval of coordinations which would meet the goal of greater efficiencies upon which the rationale of the decision was based. At the hear-

ing, testimony was received which indicates that there will be a substantial saving to the combined carrier through the planned coordination, both in capital costs since fewer locomotives will be needed and also since operating costs of the remaining locomotives may be reduced through their more efficient utilization throughout the entire system. This Panel concludes that the instant coordination was authorized by the ICC and that the question before the Panel is the application of New York Dock standards to that coordination.

The central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of Appendix I to New York Dock. As noted earlier, Section 2 deals with the right of the employees to continue to enjoy the protection of the Railway Labor Act and any agreements which may have been bargained by the collective bargaining representatives of the affected employees. Section 4, on the other hand, indicates the method by which a carrier may give notice of a change in its operations and the method of resolving disputes which may arise thereafter. This proceeding results from the application of Section 4, and its authority derives from that section.

Prior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules, or working conditions had never been raised before an arbitrator in a Section 4 proceeding. Between 1981 and 1983 at least five arbitrators ruled that the ICC did not desire that changes of rates of pay, rules, or working conditions, or of representation under the Railway Labor Act occur through arbitration under Section 4 of the New York Dock conditions.[1]

[1] *N&W, Illinois Terminal RR. Co.* and *Railroad Yardmasters of America and UTU* (Sickles, 12/10/81); *N&W, Ill. Term. RR. Co.* and *BLE and UTU* (Zumas, 2/1/82); *N&W, Ill. Term. RR. Co.* and *UTU* (Edwards, 2/11/82); *B&O, Newburgh & So. Sh. Ry. Co.* and *BMWE, USW* (Seidenberg, 8/31/83); *B&O, Newb. & S. Sh. Ry. Co.* and *UTU BLE* (Fredenberger, 9/15/83).

On August 23, 1985, the ICC in the *Maine Central Railroad Co.* case (Finance Docket No. 30532) issued a decision in which it discussed the interrelationship of the ICC orders in consolidation cases and the Railway Labor Act. In that decision, the ICC stated:

> In *Southern Control*, the Commission observed that section 6 of the RLA "would seriously impede mergers," if it were not for the protections of WJPA that were essentially incorporated in the Commission's decision. 331 I.C.C. at 171. RLA thus had no independent effect. *Southern Control* was the Commission's response to a Supreme Court directive in *Railway Labor Executives' Association* v. *U.S.*, 379 U.S. 199 (1964), that the Commission clarify the scope of protective conditions imposed in a certain merger. It may be noted that the Court's concern was not with the provisions of RLA or WJPA (except as reflected in the Commission's order), but with the level of employee protection decreed by the Commission in its order. It is that order, not RLA or WJPA, that is to govern employee-management relations in connection with the approved transaction.
>
> Such a result is essential if transactions approved by us are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions. All of our labor protective conditions provide for compulsory binding arbitration to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated. Under RLA, however, changes in working conditions are generally classified as major disputes with the results that there is no requirement of binding arbitration. See *REA Express, Inc.* v. *B.R.A.C.*, 459 F.2d 226, 230 (5th Cir. 1972). Since there is no mechanism for insuring that

the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected. Such a result we believe is unacceptable and inconsistent with section 11341 of our act and with Section 7 of the RLA which provides that arbitration awards there under may not diminish or extinguish any of our powers under the Interstate Commerce Act.*

* For the same reason we reject the argument that the provision of our conditions requiring that working conditions not be changed except pursuant to renegotiated collective bargaining agreements reinvigorates the RLA and causes its provisions to supersede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions.

Prior to, at the time of, and subsequent to this ICC decision, various arbitrators ruled that Section 4 effectively superseded the Section 2 protection contained in New York Dock and that new conditions could be imposed pursuant to such a Section 4 arbitration award.[2] It should be noted that in at least two cases arbitrators who had made earlier decisions regarding the interrelationship between sections 2 and 4 have changed their position.

In the *Union Pacific et al.* and *UTU* case, Arbitrator Brown opens his discussion of the case with the following:

> The jurisdiction of this arbitral committee is derived from the Interstate Commerce Commission, which derives its authority from Congress as set forth in Revised Interstate Commerce Act, 49 U.S.C.A. Secs. 11341(a) and 11347. This committee is a creature of ICC and is chartered to exercise a measure of the

[2] *N&W, et al.* and *UTU* (Ables, 9/25/85); *Union Pacific R.R. et al.* and *UTU* (Brown, 1/85); *C&O, Seaboard System RR.* and *Brotherhood of Railway Carmen* (Marx, 12/15/84); *Union Pacific et al.* and *American Train Dispatchers Association* (Fredenberger, 5/27/84); *BLE* and *Union Pacific et al.* (Seidenberg, 1/17/85)

> authority of ICC in order that final and effective resolution may be had in relation to multi-party disputes which will assuredly rise when employees compete for job assignments and union committees contest for troops and territory.
>
> The authority of this panel is circumscribed not by the Railway Labor Act, but by the mandate of the Interstate Commerce Commission, and, subject to the will of the ICC, we are commissioned to exercise its full authority to achieve a fair and equitable resolution of the dispute before us. The ICC's authority in cases such as that before us is plenary and exclusive.

The panel hearing the instant dispute has exactly the same authority as that noted by Arbitrator Brown, quoted above. Whatever may have been the view prior to the ICC decision in the Maine Central case, it is clear that the ICC believes that its order supersedes the Railway Labor Act protection. While it did not state specifically that the inconsistencies between Sections 2 and 4 of the New York Dock conditions are to be resolved in favor of Section 4, that conclusion is inescapable. Furthermore, as a creature of the ICC, this panel is bound to the ICC view. If that view is incorrect, it is to the courts, not this panel, that the Organization must turn for relief from this newly evolved reconciliation of the conflict between the two sections.

The Organization has raised another point which is worthy of discussion. It states that the ICC cannot take away the collective bargaining rights of the employees involved in the coordination and that the effect of this coordination is exactly to do that. This argument bears analysis. It is clear that if the employees who are moved to Atlanta are consolidated with the present Atlanta employees, the present collective bargaining agreement between N&W and ATDA may not be carried along; however, this does not change the rights of individual employees. Nor does it

eliminate a class of employees, since that class was never recognized through an election under the auspices of the National Mediation Board. If, as the ATDA claims, the Superintendents of Transportation are employees or subordinate officials within the meaning of the Railway Labor Act, they, as individuals, will have the right to petition the National Mediation Board for the selection of a representative for the purposes of collective bargaining. What is lost by the transfer is the incumbency status of the ATDA, a status arrived at through recognition, not through election. The protections afforded by New York Dock are to individual employees, not to their collective bargaining representatives. Whatever rights the ATDA may have under the Railway Labor Act as an "incumbent" bargaining representative are for determination by the National Mediation Board, not this panel. The NMB has exclusive jurisdiction over representation matters. See the Order by Justice O'Connor (A-716) of April 2, 1987 in *Western Airlines, Inc. and Delta Air Lines, Inc.* v. *International Brotherhood of Teamsters and Air Transport Employees*, ___ U.S. ___ (1987). Motion to vacate the stay orders was denied by the full Supreme Court on April 6, 1987.

II.

The Carriers offered a proposed implementing agreement on October 7, 1986. They offered a second proposed implementing agreement on November 11, 1986, and have submitted the latter as the agreement to be found appropriate by this panel.

The original Carrier agreement indicated that the new positions created in the SR Control Center would be offered first to N&W employees currently holding SOC positions in Roanoke. Those positions not filled would then be offered to other qualified N&W employees holding SOC seniority. It further indicated that N&W employees accepting positions would be relocated at the expense of the Carriers. Finally, it indicated that an employee who de-

clines an offer of employment in the SR Control Center may exercise his seniority under applicable rules and agreements.

The second Carrier agreement proposes "NW employees currently holding SOC positions in Roanoke and other NW employees holding SOC seniority will, upon request, be given consideration for employment in the SR Control Center in Atlanta." It will also encompass all protections afforded by New York Dock conditions.

The basic difference in the two agreements is that the first agreement gives the first right to the new positions in Atlanta to SOC employees and the second only allows them to request consideration for employment in that city.

The Organization offered a proposed implementing agreement which would have continued the Organization as the representative of the transferred employees and any employees subsequently hired or promoted to the SR Control Center. It also contained provisions regarding the movement of household goods and the sale of homes of transferred employees

This panel may not change the terms of the New York Dock Conditions. Only the parties may by mutual agreement modify such conditions. Since the first Carrier proposal, that of October 7, 1986, and the Organization proposal both go beyond the terms of an implementing agreement set forth in New York Dock, the second proposed Implementing Agreement of the Carriers, that of November 11, 1986, will be placed in effect.

Award

The parties shall adhere to the Implementing Agreement as proposed by the Carriers on November 11, 1986, subject only to the following:

Within a period of 14 days following the date of this Award, the parties shall meet to determine if there are

any mutually agreeable revisions of the November 11, 1986, proposal. If no agreement is reached on any such changes during the above specified 14-day period, the Implementing Agreement shall be as proposed by the Carriers on November 11, 1986.

Robert O. Harris
Chairman and Neutral Member

R.S. Spenski
Carrier Member
[Concur]

W. G. Mahoney
Organization Member
[Dissent]

May 19, 1987

DISSENT OF ORGANIZATION MEMBER

I must dissent from the Decision and Award (Decision) dated May 19, 1987, which was drafted by the Chairman and Neutral Member and concurred in by the Carriers' Member.

The Decision sanctions the unilateral transfer of work from Norfolk and Western Railroad SOC Supervisors and Assistant Chief Dispatchers to non-agreement personnel on the Southern Railway. The subject work is exclusively reserved to N&W employees under numerous longstanding agreements between the American Train Dispatchers Association ("ATDA" or "Organization") and the railroads which now constitute the N&W system through merger. N&W employees' exclusive right to this work was confirmed by the National Railroad Adjustment Board, Third Division in Award No. 16556 (ATDA Exhibit No. 1). The transfer of the work creates a major dispute under the Railway Labor Act.

The Decision mischaracterizes the position of the ATDA; it is replete with factual and legal errors; it renders conclusions without attempting to justify them; and, it reaches contradictory conclusions regarding the jurisdiction of the National Mediation Board, for it usurps that jurisdiction by stripping from the SOC Supervisors their representation rights while holding that the National Mediation Board "has exclusive jurisdiction over representation rights" of the ATDA.

Indeed, if this be a valid award, all future arbitrations under Section 4 of the *New York Dock* conditions have been rendered futile for it has laid a foundation upon which the railroads can erect corporate edifices unburdened by rules of law or statutory or contractual provisions; all will be superseded by the "automatic exemption" provisions of Section 11341(a) of the Interstate Commerce Act.

On the issue of the employees' representation rights, the Decision is a gaggle of contradictions and unsupported conclusions. At page 9 the Decision identifies the SOC Supervisors as "employees who have chosen to be represented for the purpose of collective bargaining". At pages 14 and 15, it reaches a contrary conclusion in holding that the employees' loss of their representation rights and their collective bargaining agreement is no loss at all because their right to representation "was never recognized through an election under the auspices of the National Mediation Board." The distinction between "election" and "recognition" in the latter statement is itself contradictory of the historical rulings of the National Mediation Board, including those contained in its very recent decision in *TWA/Ozark Airlines*, 14 N.M.B. 215 (April 10, 1987).

The Decision first concludes at page 15 that the "present collective bargaining agreement [sic] between N&W and ATDA may not be carried along [when the work is transferred to Southern]" but gives no reason for that

conclusion;[1] and, then proceeds to the incredible conclusion, again unsupported, that the employees' loss of their agreements and their statutory representation "does not change the rights of the individual employees." The Decision finally concludes its discussion of the rights of the N&W employees by saying that those employees can, in effect, retrieve the rights they did not lose by petitioning the National Mediation Board for an election after they get to Southern, provided they can demonstrate the Southern work is that of "employees or subordinate officials within the meaning of the Railway Labor Act." (Decision, p. 15.)

The same paragraph concludes that the only loss occasioned by the transfer "is the incumbency status of the ATDA" (Decision, p. 15) and since that is not protected by *New York Dock* it need not be addressed. But if ATDA has any rights as an "incumbent baragaining representative" they "are for determination by the National Mediation Board, not this panel." The Decision, having stripped the N&W employees of their representation and Railway Labor Act rights, then reaches its final, incongruous conclusion that with regard to the Organization "the NMB has exclusive jurisdiction over representation matters."

The Decision errs in its confusion of the several contentions of the Organization and its failure to mention others.

At page 7, the Decision inaccurately characterizes the Organization's position as follows:

> "It further contends that even if the ICC has such power [to eliminate Railway Labor Act and collective bargaining agreement rights of entire classes of employees], it could only be exercised when necessary to effectuate a transaction approved by the ICC and this transaction, the transfer of SOC employees, was never presented to the Commission for approval."

[1] Perhaps no supporting reason is offered because this conclusion would seem clearly contrary to established law. *BN, Inc.* v. *ARSA*, (7th Cir. 1974) 503 F.2d 58, 63.

The position of the Organization was, and remains:

1. The ICC has no authority, and therefore a *New York Dock* arbitrator has no authority to extinguish the Railway Labor Act and collective bargaining agreement rights of employees. (ATDA Subm., pp. 12-14, 19-21; ATDA Brief, pp. 1, 7, 9-13.)

2. Even if the ICC might have such rights, it has never claimed the statutory authority to eliminate the Railway Labor Act and collective bargaining rights of entire classes of employees; in this case the entire class of SOC Supervisors on the N&W. (ATDA Subm., pp. 17-19, 21; ATDA Post-Hearing Brief, pp. 1-2, 4.)

3. If such authority existed it could be exercised only if necessary to carry out the transaction approved. (ATDA Subm., p. 19-20; ATDA Brief, p. 2, 5-6, 6 n.3, 7, 14, 17.)

4. The "approved transaction" was fully consummated or "carried out" when NS achieved control of N&W and Southern in 1982, therefore, no exemption authority could now be triggered or activated. (ATDA Subm., p. 18, 20.)

5. If the "approved transaction" was not simply approval of NS control of N&W and Southern but extended to particular changes in operations, services or facilities, the change involving the SOC Supervisors could not have been "approved" because it was never presented to the Commission and, in any event, the Interstate Commerce Act does not provide the I.C.C. with jurisdiction to approve such changes. (ATDA Subm., pp. 14-17, 19; ATDA Brief, pp. 2, 4-5.)

6. The Arbitration Panel and the parties are governed by the orders issued in the *NS Control* case which explicitly preserve the Railway Labor Act and collective bargaining rights of the employees in Section 2 of *New York Dock* and contain no contrary provisions or later orders from which the Organization could have appealed. (ATDA Brief, pp. 2,4,8.)

7. Assuming such authority to exist in the I.C.C. and the arbitrator, such superseding authority could not be exercised unless "necessary" to "carry out the transaction" and the implementing agreement submitted by ATDA demonstrated it was not "necessary" to strip SOC Supervisors of their rights in order to accomplish the transfer desired by NS. (ATDA Subm., pp. 19-20, 21-28; ATDA Brief, pp. 2, 3 nl, 5-6, 6 n3, 7, 14, 14 n7; Transcript of Hearing, pp. 191, 192, 203-204.)

This last argument of ATDA was rejected by the simple device of ignoring it.

Regarding the elimination of employee rights in the face of Section 2 of *New York Dock* which specifically preserves such rights and in the absence of any language in the orders governing the *NS control* case to indicate otherwise, the Decision concludes at page 11 that the "central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of Appendix [sic] I to New York Dock." It then finds, after quoting extensively from the Commission's 1985 *Maine Central* decision and an arbitration decision reached thereafter, that Section 2 is now wholly meaningless. (See, Decision, p. 14.)

The Decision quotes from a 1985 decision of an Arbitrator Brown in which he states that arbitrators under *New York Dock* "are commissioned to exercise . . . [the] full authority [of the ICC] to achieve a *fair and equitable*

solution of the dispute before us",[2] but then reaches a result which is clearly unfair and inequitable. The Decision justifies this result by engaging in hypertechnical reasoning which defies even a cursory scrutiny. For example, the Decision determines that the employees have lost no rights because their representation on N&W resulted from "recognition, not election" and their "present collective bargaining agreement [sic] [which] . . . may not be carried along," involve rights of the Organization and not the individual employees. Another example is the Decision's conclusion that ATDA's proposed implementing agreement and the first of the two proposals submitted by NS have gone "beyond the terms of the New York Dock Conditions" presumably because they would give "the first right to the new positions in Atlanta to SOC employees".[3] Therefore, the Decision would impose the Carriers' second proposed implementing agreement which "only allows them [SOC Supervisors] to request consideration for employment in that city [of Atlanta]". (Decision, pp. 16-17.)

Article I, Section 4 of *New York Dock requires* the "transaction . . . [to] provide for the *selection of forces from all employees involved* on a basis accepted as appropriate . . . and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." (Emphasis supplied.) Section 9 of *New York Dock requires* the carrier to pay the affected employee's moving expenses. There is nothing in *New York Dock*, any decision of the Commission, or any arbitration decision prior to this one which holds an arbitrator cannot impose a "fair and equitable" agreement or that he must accept a provision which vio-

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[2] Emphasis supplied. See also ATDA Brief, pp. 15-19 for analysis of authorities on "fair and equitable" requirements.

[3] No reason was given as to how the ATDA proposal exceeded *New York Dock* limitations.

lates Section 4 by merely "considering" employees for work taken from them. (Decision, p. 16.)

If one compares the explicit, simple English in which Sections 4 and 9 are couched with the statements on pages 16 and 17 of the Decision and follows that comparison with a review of the entire Decision and the record in this case, one is compelled to conclude that the Decision has fallen victim to egregious errors and would visit the bitter consequences of those errors only upon the N&W employees.

WM. G. MAHONEY
Organization Member of Arbitration Panel

May 19, 1987

ATTACHMENT "A"

(Revised November 20, 1986)

IMPLEMENTING AGREEMENT

BETWEEN

NORFOLK AND WESTERN RAILWAY COMPANY SOUTHERN RAILWAY COMPANY

AND NORFOLK AND WESTERN EMPLOYEES

REPRESENTED BY

THE AMERICAN TRAIN DISPATCHERS ASSOCIATION

WHEREAS, Norfolk and Western Railway Company and Southern Railway Company have filed applications with the Interstate Commerce Commission ("ICC") in Finance Docket No. 29430 and related sub-dockets 1 through 6 ("FD 29430") seeking approval of the acquisition by Norfolk Southern Corporation ("NSC") (formerly NWS Enterprises, Inc.) of control of Norfolk and Western Railway Company and its carrier subsidiaries ("NW") and of Southern Railway Company and its carrier subsidiaries ("SR") and coordination of operations of NW and SR; and

WHEREAS, the ICC has approved the aforesaid Finance Docket and has imposed the employee protection conditions set forth in New York Dock Ry.—Control—Brooklyn Eastern District Terminal, 354 ICC 399 (1978), as modified at 360 ICC 60 (1970) ("New York Dock Conditions"), therein; and

WHEREAS, the Carriers have served notice on September 15, 1986 of their intention to coordinate certain NW work performed by NW employees in the System Operations Control (SOC) in Roanoke, Virginia into the SR Control Center in Atlanta, Georgia on or about December 15, 1986; and

WHEREAS, the parties signatory hereto desire to reach an implementing agreement consistent with Article I, Sec-

tion 4 of the New York Dock Conditions with respect to the transaction described in this agreement;

NOW, THEREFORE, IT IS AGREED, among NW, SR ("Carriers") and the American Train Dispatchers Association ("ATDA"), as follows:

ARTICLE I

Section 1

Effective fifteen (15) days after notice is given to NW employees in SOC, located in Roanoke, Virginia, with a copy to the General Chairman, the work performed by NW employees in SOC shall be coordinated into the SR Control Center in Atlanta, Georgia, as described in Attachment 1 to this Agreement.

Section 2

The notice provided for under Section 1 hereof will list the names, seniority dates and rates of pay of the regular occupants of the positions in SOC, Roanoke, to be abolished, and the positions to be established in the SR Control Center in Atlanta.

Section 3

Nothing in this agreement prevents the positions to be established in the SR Control Center in Atlanta from being established on the same terms and conditions as apply to other comparable positions in existence in the SR Control Center prior to the effective date of this Agreement.

Section 4

NW employees currently holding SOC positions in Roanoke and other NW employees holding SOC seniority will, upon request, be given consideration for employment in the SR Control Center in Atlanta.

ARTICLE II

Section 1

Any employee adversely affected by this transaction will be afforded the protective benefits prescribed by the New York Dock Conditions.

Section 2

An employee eligible for benefits under the New York Dock Conditions as a result of this transaction must file a claim therefor in writing with the officer(s) designated by the Carrier(s) within sixty (60) days following the end of the month for which a claim is filed on the claim form provided by the Carrier(s).

Section 3

Protective benefits shall cease prior to the expiration of the employee's protective period in the event of the employee's resignation, death, retirement, termination for justifiable cause, or failure to return to service upon recall.

ARTICLE III

This agreement shall become effective as of the date executed and constitutes the Implementing Agreement fulfilling the requirements of Article I, Section 4, stipulated in the New York Dock Conditions. Where rules, other agreements and practices conflict with this agreement, the provisions of this agreement shall apply.

Signed at Roanoke, Virginia this 11th day of November, 1986.

FOR THE AMERICAN TRAIN DISPATCHERS ASSOCIATION:	FOR NORFOLK AND WESTERN RAILWAY COMPANY:
General Chairman	Assistant Vice President Labor Relations
Approved:	FOR SOUTHERN RAILWAY COMPANY:
Vice President	Assistant Vice President Labor Relations

3/T-00871/rss

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29430 (Sub-No. 20)

NORFOLK SOUTHERN CORPORATION—CONTROL—NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

Decided: June 5, 1987

On May 29, 1987, the American Train Dispatchers Association (ATDA) filed a petition for stay pending the Commission's review of the arbitration award in the matter of *Norfolk and Western Railway Company, Southern Railway Company, and American Train Dispatchers Association*, Award of Referee Harris, May 19, 1987.[1] Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern) filed a reply.

The arbitration process was invoked under the provisions of the employee protective conditions we imposed in connection with our approval of the acquisition of control by Norfolk Southern Corporation (NS) of N&W and Southern in *Norfolk Southern Corp.—Control—Norfolk & W. Ry. Co.*, 366 I.C.C. 173 (1982) (*Norfolk Southern Control*). The employee protective conditions imposed in that proceeding are those set forth in *New York Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*).

At issue here is NS's coordination of the locomotive power distribution of N&W and Southern. NS will transfer N&W's locomotive power distribution supervisors, who are represented by ATDA, from N&W's Systems Operating Center at Roanoke, VA, to Southern's Control Center in Atlanta, GA, where they will work with Southern's power

[1] ATDA also filed a petition for review of the arbitration award. That petition will be considered in a subsequent decision.

distribution supervisors, who have historically been considered management and not subject to a collective bargaining agreement. The arbitration award imposed an implementing agreement to effectuate this coordination of forces.

The Commission's authority to review arbitration awards was recently asserted in *Chicago and North Western Transportation Company—Abandonment—Near Dubuque and Oelwein, IA*, ___ I.C.C. 2d ___ (1987) (*Oelwein*).[2] Pending our review of the arbitration award, we have been asked to stay the award's effectiveness. Assuming we have the authority to stay an arbitration award pending our review, although we are not so deciding that issue here, we conclude that a stay would not be justified.

In determining whether petitioner has demonstrated entitlement to a stay, we refer to the four factors identified in *Washington Metropolitan Area Transit Comm.* v. *Holiday Tours, Inc.*, 559 F.2d 1841 (D.C. Cir. 1977):

(1) that there is a strong likelihood that the movant will prevail on the merits;

(2) that the movant will suffer irreparable harm in the absence of a stay;

(3) that other interested parties will not be substantially harmed; and

(4) that the public interest supports the granting of the stay.

Petitioner's showing under the last three factors is unpersuasive, and its contention that it will likely prevail on the merits is at best arguable.

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[2] ATDA contends that arbitration awards under the *New York Dock* conditions are reviewable in the courts and that the Commission can participate in such disputes solely through court referral. In light of *Oelwein*, ATDA submitted its petition for stay to the Commission, but it states that it does so without prejudicing its right to judicial review.

In regard to prevailing on the merits, ATDA raises jurisdictional questions and a substantive question about the terms and conditions of the implementing agreement accepted by the arbitration panel. First, as to the jurisdictional issues, ATDA argues that: (1) the transfer of locomotive distribution functions from Roanoke to Atlanta was in violation of the Railway Labor Act (RLA), and the arbitration panel's authorization of the transfer was in excess of its jurisdiction; and (2) the Commission's approval of NS's control of N&W and Southern did not exempt the carriers from the RLA in regard to the subject transfer because (a) the coordination of locomotive distribution is not a transaction subject to approval by the Commission, and (b) the transfer was not specifically mentioned in the Commission's authorization in *Norfolk Southern Control*.

Petitioner has not shown that it is likely to prevail on its jurisdictional arguments. The arbitration panel's jurisdiction over the transfer stems from the Commission's jurisdiction over the transaction. The transfer is not subject to the RLA because the Commission, in *Norfolk Southern Control*, authorized the coordination of N&W and Southern under NS, subject to *New York Dock*. The mandatory arbitration provisions of *New York Dock* take precedence over the RLA dispute resolution procedures in transactions approved by this Commission. See Finance Docket No. 30532, *Maine Central Railroad Company, Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Company—Exemption from 49 U.S.C. 11342 and 11343* (not printed), served September 13, 1985. The proposed transfer, although not specifically mentioned in *Norfolk Southern Control*, is one of the future coordinations expected to flow from, and is therefore part of, the control transaction that we approved. Indeed, the coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction. *See* arbitration decision, pp. 10-11. The

arbitration panel, citing *Maine Central*, correctly exercised its jurisdiction over the dispute arising from the transfer.

Second, ATDA argues that the arbitration panel made a substantive error in accepting verbatim the terms and conditions of an implementing agreement proposed by the carriers. ATDA had proposed that the *New York Dock* conditions be imposed along with certain other conditions. Furthermore, at first the carriers had also proposed expanding the *New York Dock* protections with additional conditions. However, the carriers' later proposal included only *New York Dock* conditions. The arbitration panel found that it was not authorized to "change the terms of the *New York Dock* conditions" and placed into effect the later proposed implementing agreement of the carriers since the other two proposals "go beyond the terms of an implementing agreement set forth in *New York Dock*." This raises an interesting, and perhaps significant, issue concerning the authority of the arbitration panel to set the terms and conditions of the implementing agreement. We cannot determine at this time, however, whether petitioner's position on this issue will likely prevail. Even if we were to assume that it would, we still conclude that the other stay factors do not weigh in favor of granting a stay.

Petitioner has not demonstrated that in the absence of a stay it will suffer irreparable harm. ATDA argues that its members who are affected by the transfer will be irreparably harmed because they will be compelled to move from Roanoke to Atlanta, that those employees who transfer will lose the protections of their collective bargaining agreements while the petition for review is pending, and that those employees who choose not to transfer will, by exercising their seniority rights, displace other employees.

ATDA's arguments are not persuasive. The potential harm that they foresee is not irreparable. If employees were to suffer monetary damage attributable to the move,

petitioner has not shown why it is not possible for those employees to be adequately compensated under the *New York Dock* conditions. Since employees transferred to Atlanta will have an opportunity to obtain representation, it has not been shown that the employees will be foreclosed from receiving protections under a new collective bargaining agreement. Furthermore, N&W and Southern have indicated that the involved employees (except for one retiring employee) have elected to transfer to Atlanta and thus no employee displacement will occur.

As to harm to other parties, the record shows that N&W and Southern will realize a $26 million capital investment saving and an annual $2 million operating expense saving, exclusive of labor cost savings, from the coordination. To stay the transfer would delay the coordination and thereby prevent the carriers from realizing these savings. In addition, the carriers indicate that they, as well as numerous N&W management employees have made certain preparations in expectation of the transfer and that additional costs would be incurred should the transfer be delayed. The N&W management employees have sold their homes or terminated their leases in Roanoke and purchased new homes or entered into leases in Atlanta. Additional costs would have to be incurred for the N&W management employees to retain residences in Roanoke. The carriers have installed computer and telephone equipment in Atlanta; if they are unable to effectuate the transfer on June 6, 1987, the carriers will incur additional computer and telephone costs to relay distribution information to Roanoke.

Petitioner has also failed to show that the public interest favors a stay. The Commission, in *Norfolk Southern Control*, has found that coordination of the carriers is in the public interest. The economies to be realized by this coordination will benefit the carriers and the shipping public. To stay the transfer would delay these economies that have already been shown to be in the public interest.

This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The petition for stay is denied.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Sterrett did not participate.

Noreta R. McGee
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION–CONTROL–CHESSIE SYSTEM, INC. AND SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 21215

SEABOARD AIR LINE R.R. CO.–MERGER–ATLANTIC COAST LINE R.R. CO.

Decided: June 5, 1987

On May 29, 1987, the Brotherhood Railway Carmen (BRC), Division of Brotherhood of Railway & Airline Clerks, filed an emergency motion to dismiss as moot the petition filed April 13, 1987, by CSX Transportation, Inc., (CSX) and The Chesapeake and Ohio Railway Company (C&O) for administrative review of an Arbitration Committee opinion and award.[1] BRC has also petitioned the Commission to order CSX to cease and desist from its proposal to implement on June 8, 1987, the coordination permitted by the Arbitration Committee determination. CSX and C&O jointly filed a reply in opposition to the petition for a cease and desist order.

The Arbitration Committee was convened pursuant to section 4 of the *New York Dock* conditions (*New York Dock Ry.- Control -Brooklyn East. Dist.*, 360 I.C.C. 60 (1979)), imposed by this Commission in *CSX—Control*, 363 I.C.C. 521 (1980) and section 4 of a November 3, 1966 merger protective implementing agreement (Orange Book agreement) between certain predecessors of CSX, the former Seaboard Air Line Railroad Company and the Atlantic Coast Line Railroad Company and various labor unions including BRC. In an opinion and award dated March 23,

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[1] BRC has also sought review of the Arbitration Committee opinion and award in a cross-complaint.

1987, the Arbitration Committee directed the parties to adopt an implementing agreement governing the proposed consolidation of CSX's freight car heavy repair facilities at Waycross, GA and Raceland, KY. Under the implementing agreement imposed by the Arbitration Committee, the Waycross facility would be closed and its work transferred to Raceland. However, employees entitled to the benefits of the Orange Book agreement could not be compelled to transfer to Raceland.

The carriers have petitioned this Commission to reverse that aspect of the Arbitration Committee award which prohibited them from requiring Orange Book protected employees to transfer from Waycross to Raceland. Nevertheless, on May 14, 1987, CSX formally advised BRC that the implementing agreement imposed by the arbitration award of March 23, 1987, would become effective on May 26, 1986, and that the anticipated date for implementing the coordination was June 8, 1987. BRC is concerned that employees exercising their Orange Book rights could be deprived of their jobs as well as their protection should the carriers be allowed to implement the arbitration award while, at the same time, continuing their efforts to reverse a part of it. BRC notes that should the carriers be successful in reversing the employee Orange Book rights recognized in the Arbitration award, affected Orange Book employees would have no opportunity to bid for Raceland jobs. As a result of the implementation of the coordination, employees junior to the Orange Book employees could be expected to fill the available positions at Raceland.

Without necessarily deciding whether we have the authority to issue a cease and desist order in the present situation, but assuming we have that authority, we conclude that there is insufficient reason for the issuance of such an order in this matter. In deciding whether a cease and desist order is justified we will use the criteria for reviewing stay requests as set forth in *Washington Metropolitan Area Transit Comm'n.* v. *Holiday Tours, Inc.*,

559 F.2d 841 (D.C. Cir. 1977). Even if the position of BRC should ultimately prevail in this proceeding, BRC has not shown that either Orange Book employees or non-Orange Book employees will be irreparably injured absent a stay. The Orange Book employees currently working at Waycross may remain at their present location in a fully protected status.[2] If they elect to move to Raceland and the BRC prevails, they will return to Waycross without loss of seniority rights. Arrangement can be made for reimbursement of any expenses the employees incur in those movements. Non-Orange Book employees may move to Raceland and, if the BRC prevails, may return to Waycross and be restored to their former status, and arrangements can be made to reimburse those employees for any expenses they incur. Non-Orange Book employees who remain in Waycross will not be discharged, and may exercise their seniority rights to bid on the non-heavy repair work that will remain at Waycross. As the carriers concede, this Commission can make the non-Orange Book employees whole for any monetary losses they would suffer if BRC prevails.

In contrast, granting the cease and desist order would harm the carriers because they would be precluded from realizing the efficiencies that consolidation of the two repair facilities would produce.

BRC has also not demonstrated that it will likely prevail before the Commission in this proceeding. BRC has also failed to show that the public interest favors a stay. The Commission, in its decisions authorizing the acquisitions of control in F.D. No. 28905 and F.D. No. 21215, found that coordination of the carriers is in the public interest. The economies realized by this coordination will benefit the carriers and the shipping public. To stay the transfer would

[2] Indeed, in their reply, the carriers indicate that they will hold open a sufficient number of positions at Raceland to accommodate Orange Book employees.

delay these economies that have already been shown to be in the public interest.

It is not necessary now to deal with the motion to dismiss and therefore we will hold it under advisement.

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The motion to dismiss the petition for administrative review of the Arbitration Committee opinion and award is held under advisement.
2. The petition to order CSX to cease and desist from implementing the described coordination is denied.
3. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Sterrett did not participate.

Noreta R. McGee
Secretary

(SEAL)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 26, 1990

Mr. Jeffrey S. Berlin
2300 N Street, N.W.
Suite 625
Washington, DC 20037

Re: Norfolk and Western Railway Company, et al.
v. American Train Dispatchers Association, et al.,
No. 89-1027
CSX Transportation, Inc.
v. Brotherhood of Railway Carmen, et al.
No. 89-1028

Dear Mr. Berlin:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted.

The cases are consolidated and a total of one hour is allotted for oral argument.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

No. 89-1027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

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May 25, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Does the exemption "from all other law" in the Interstate Commerce Act, 49 U.S.C. § 11341(a), which applies to a railroad participating in a transaction that has been approved by the Interstate Commerce Commission, extend to claims that are based on the railroad's contracts and are asserted exclusively under federal law?

LIST OF PARTIES

The parties in the Court of Appeals were the American Train Dispatchers Association, petitioner; the Interstate Commerce Commission and the United States of America, respondents; and Norfolk and Western Railway Company and Southern Railway Company,[1] intervenors in support of the respondents.[2]

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[1] The list of companies affiliated with Norfolk and Western Railway Company and Southern Railway Company required by this Court's Rule 29.1 has previously been supplied in the Petition for a Writ of Certiorari, at pp. ii-iv.

[2] The decision in the Court of Appeals also covered that court's Case No. 88-1724, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*. The parties in Case No. 88-1724 were petitioner Brotherhood of Railway Carmen, Division of Transportation-Communications International Union; respondents Interstate Commerce Commission and United States of America; and intervenor CSX Transportation, Inc. This Court, in its Case No. 89-1028, has granted certiorari in D.C. Cir. Case No. 88-1724, and has consolidated Case No. 89-1028 with the instant case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1027

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR PETITIONERS NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

OPINIONS BELOW

The July 25, 1989 decision of the Court of Appeals is reported at 880 F.2d 562 and is reprinted in the Appendix to the Petition for a Writ of Certiorari ("89-1027 Pet. App.") at 1a. The Court of Appeals' order of September 29, 1989, amending the decision, is not reported and is reprinted at 89-1027 Pet. App. 27a. The decision of the Interstate Commerce Commission dated May 28, 1988, which was the administrative

decision under review in the Court of Appeals, is not reported and is reprinted at 89-1027 Pet. App. 29a.

JURISDICTION

The Court of Appeals entered its decision on July 25, 1989. Norfolk and Western Railway Company ("NW") and Southern Railway Company ("Southern") filed a timely petition for rehearing, which was denied in an order entered on September 29, 1989 (89-1027 Pet. App. 49a). The petition for a writ of certiorari was filed on December 28, 1989, and was granted on March 26, 1990 (J.A. 43).[3] Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

49 U.S.C. § 11341(a), a section of the Interstate Commerce Act, provides:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

[3] Citations in this form refer to the consolidated Joint Appendix filed in connection with this case and with the companion *CSX Transportation, Inc. v. Brotherhood of Railway Carmen, et al.*, No. 89-1028.

STATEMENT OF THE CASE

The Interstate Commerce Commission ("ICC") has broad authority to approve proposed railroad consolidations that the ICC finds to be in the public interest. 49 U.S.C. §§ 11343-44. When the ICC does so, a provision of the Interstate Commerce Act, 49 U.S.C. § 11341(a), provides that a person participating in the approved transaction is "exempt from the antitrust laws and from all other law . . . as necessary to let that person . . . carry out the transaction. . . . " This case concerns the reach of the § 11341(a) exemption.

In 1982, the ICC approved the coming together of NW and Southern under the common control of Norfolk Southern Corporation ("Norfolk Southern"). *Norfolk Southern Corp.—Control—Norfolk & Western Ry. and Southern Ry.*, 366 I.C.C. 173 (1982) ("*Norfolk*

Southern Control"). The ICC authorized the consolidation of facilities among the various Norfolk Southern-controlled railroads in the interest of operational efficiency, and directed, in accordance with a provision of the Interstate Commerce Act, 49 U.S.C. § 11347, that employees affected by any such consolidations—including those not detailed in the original Norfolk Southern operating scheme—were to receive the extensive benefits (including wage protection for up to six years) prescribed in the ICC's "*New York Dock*" employee protective conditions.[4] 366 I.C.C. at 230-31.

In 1986, as part of the ongoing process of consolidating their operational functions, NW and Southern decided to consolidate at one location the function of "distribution of power"—the assignment of locomotives to particular trains and facilities. Until then, power distribution on NW was performed in a facility in Roanoke, Virginia (the System Operations Center, or "SOC") by employees known as "SOC supervisors," who were represented by respondent American Train Dispatchers Association ("ATDA") and worked under a labor agreement to which the parties were NW and ATDA. In contrast, power distribution on Southern was performed in Atlanta, Georgia, by company officers—nonunion management employees known as Superintendents Transportation-Locomotive ("STLs").

The railroads proposed that power distribution for the entire Norfolk Southern system would now be

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[4] These conditions were adopted by the ICC in *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

performed by Southern at its Atlanta facility. Because this rearrangement was to be carried out under authority of the ICC's original *Norfolk Southern Control* decision, the railroads recognized that the *New York Dock* protective conditions would apply. Accordingly, as required by Art. I, § 4 of the protective conditions, the railroads notified ATDA of the proposal and offered to negotiate an "implementing agreement" to cover the transaction.[5]

Negotiations failed. The railroads wanted Southern to continue to handle power distribution using STLs, and they proposed to offer all the NW SOC supervisors management jobs as Southern STLs. This would result in the employees' receiving substantial *increases* in wages and benefits, as well as generous relocation allowances and the assurance of six years' wage protection under the *New York Dock* conditions. ATDA maintained, however, that the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), and the SOC supervisors' labor agreement would not permit this

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[5] Art. I, § 4 of the protective conditions requires the railroad to give 90 days' written notice of a transaction that "may cause the dismissal or displacement of any employees, or rearrangement of forces," and, if requested, to negotiate an "agreement with respect to application of" the protective conditions to the transaction. The section also provides that "[e]ach transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." If the parties are unable to agree on the terms of this so-called "implementing agreement," either party may submit the dispute to binding arbitration. 360 I.C.C. at 85.

result, and that the NW power distribution work could be moved to Atlanta only if the existing NW/ATDA labor agreement moved to Atlanta with the work and continued to cover the NW SOC supervisors in their new location.

The railroads invoked arbitration under Art. I, § 4 of the protective conditions, and, following a hearing, the arbitrator issued an award in which he imposed an implementing agreement.[6] The arbitrator authorized the transfer of work from Roanoke to Atlanta as proposed by the railroads. He also ruled that NW SOC supervisors who accepted STL positions with Southern could not carry their existing labor agreement with them to Atlanta but would become Southern officers. The implementing agreement he imposed provides, *inter alia*, that "[w]here rules, other agreements and practices conflict with this agreement, the provisions of this agreement shall apply." J.A. 31.[7]

[6] *Norfolk & Western Ry. and Southern Ry. and ATDA*, May 19, 1987 (Harris, Arb.) The arbitrator's award is reproduced in the Joint Appendix at J.A. 8-32. Technically, the award was rendered by a three-person "committee" or "panel" established by agreement of the parties; the panel consisted of a neutral referee (the arbitrator), one member representing the railroads, and one member representing the union. For this reason, the ICC decision below refers to the award as the "panel's" decision. The railroad member of the panel concurred in the arbitrator's award and the union member dissented.

[7] The transfer of power distribution work took place on June 6, 1987. Southern offered STL positions to all nine active and all three furloughed NW SOC supervisors, and nine of the total accepted and moved to Atlanta.

ATDA sought review of the award by the ICC.[8] The ICC affirmed the award in all respects, holding, *inter alia*, that the arbitrator

> correctly found . . . that the terms of [*Norfolk Southern Control*] and specifically the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements. Moreover, an action taken under our control authorization is immunized from conflicting laws by section 11341(a). The proposed transfer, although not specifically mentioned in *Norfolk Southern Control*, is one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that we approved.

89-1027 Pet. App. 35a (citations omitted). On the merits of the case, the ICC agreed with the arbitrator's decision not to impose the NW/ATDA labor agreement on work in the consolidated Atlanta office—relief sought by ATDA—finding that to impose that agreement "would jeopardize the transaction because the work rules it mandates are inconsistent with the

[8] The ICC exercises authority to review the awards of arbitrators acting under the employee protective conditions. *International Brotherhood of Electrical Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988). *See United Transportation Union v. Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987) (arbitration award is not reviewable under RLA but is exclusively subject to review under Interstate Commerce Act), *cert. denied*, 484 U.S. 1006 (1988).

carriers' underlying purpose of integrating the power distribution function." 89-1027 Pet. App. 37a.

ATDA sought judicial review of the ICC's decision under 28 U.S.C. §§ 2321(a) and 2341 *et seq.*[9] In the Court of Appeals, ATDA's principal contention was that the ICC exceeded its jurisdiction by upholding the arbitrator's authority to allow the transfer of work rather than remitting the parties to the RLA procedures for negotiating changes in agreements, 45 U.S.C. § 156.

In its July 25, 1989 decision covering this case and the companion *Brotherhood of Railway Carmen v. ICC*, the Court of Appeals resolved only the first of what it perceived to be three primary questions relating to the reach of the ICC's power under the Interstate Commerce Act presented by this case. The court, concluding that § 11341(a) reaches only "positive enactments," not contracts, 89-1027 Pet. App. 18a, held that § 11341(a) "does not grant the ICC its claimed power to override provisions of a [collective bargaining agreement]," 89-1027 Pet. App. 26a, and reversed the ICC on this point.

The Court of Appeals declined to decide what it took to be the separate question whether 49 U.S.C. § 11341(a) "may operate to override provisions of the RLA" itself. 89-1027 Pet. App. 19a. And the court also declined to address the ICC decision's conclusion

[9] ATDA filed its petition for review in the United States Court of Appeals for the Eleventh Circuit. NW and Southern obtained leave to intervene in the review proceeding as of right, under 28 U.S.C. §§ 2323 and 2348 and Fed. R. App. P. 15(d). By order of September 15, 1988, the Eleventh Circuit transferred the case to the District of Columbia Circuit.

that the arbitration procedure in the *New York Dock* conditions, adopted under § 11347, displaces RLA-derived rights. 89-1027 Pet. App. 25a-26a. The court remanded the case with respect to the issues it had not addressed "in order that the agency may determine whether further proceedings are necessary." 89-1027 Pet. App. 26a.[10]

NW and Southern petitioned for rehearing and filed a suggestion of rehearing *en banc*. The petition and suggestion were denied by orders issued on September 29, 1989. 89-1027 Pet. App. 49a, 51a.[11]

On March 26, 1990, this Court granted the petition of Southern and NW for a writ of certiorari to the

[10] The Court of Appeals did not address objections ATDA had raised based on the Fifth Amendment and 45 U.S.C. § 152 Fourth.

[11] The ICC also filed a document styled as a petition for rehearing. The ICC, however, did not ask the Court of Appeals to rehear the case immediately but instead represented that it intended to conduct a proceeding on remand as directed by the court, and it asked the court "to refrain from ruling on this petition for rehearing until the Commission's decision on remand is published." ICC Petition for Rehearing at 2. By order entered on September 29, 1989, the Court of Appeals directed "that consideration of the aforesaid petition is deferred pending release of the ICC's decision on remand." 89-1027 Pet. App. 54a. Also by separate orders entered on the same date, the Court of Appeals entered its judgment of remand, 89-1027 Pet. App. 47a, and amended its July 25, 1989 decision to specify that it was remanding only the "records" and not the "cases" to the ICC. 89-1027 Pet. App. 27a-28a. The effect of that amendment, under the court's local rule 15(c), was to make clear that the court retained jurisdiction over the matter and that it would not be necessary for a party aggrieved by the ICC's eventual decision on remand to file a new petition for review. The ICC is now in the process of conducting its proceeding on remand.

District of Columbia Circuit Court of Appeals; and, on that date, the Court also granted the petition for a writ of certiorari of CSX Transportation, Inc. in the companion *CSX Transportation, Inc. v. Brotherhood of Railway Carmen, et al.*, and consolidated the two cases. J.A. 43.

SUMMARY OF ARGUMENT

This Court ruled in *Schwabacher v. United States*, 334 U.S. 182 (1948), that a railroad participating in a consolidation that has been approved by the Interstate Commerce Commission is, by operation of the exemption "from all other law" contained in 49 U.S.C. § 11341(a), exempt from claims based on the railroad's private contracts. The Court of Appeals, presented with the question whether § 11341(a) extends to claims asserted under labor agreements governed by the Railway Labor Act ("RLA"), held that the statutory exemption does not extend to claims based on contracts at all. That holding is plainly wrong under *Schwabacher*.

The Court of Appeals went farther and concluded that claims based on labor agreements, in particular, survive the § 11341(a) exemption, and that a railroad is not freed from such claims even if their recognition would prevent the railroad from carrying out the ICC-approved consolidation. The effect of the Court of Appeals' decision is to hand to labor unions the power of veto over the implementation of transactions found to be in the public interest. The right asserted under the labor agreements in question here is the right to bargain over changes in existing agreements in accordance with the procedures set forth in § 6 of the RLA, 45 U.S.C. § 156, before the approved consolidation may be carried out. Not only is exhaustion of the § 6 procedure "an almost interminable process," *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 155 (1969), but the whole point of the RLA is precisely *not* to force parties to agreement, *see Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 725 (1945). Permitting a labor union to assert claims based on its agreements would allow the union to thwart a consolidation's implementation simply by insisting on strict adherence to the agreements' terms and refusing to agree to any necessary changes. That result cannot survive *Schwabacher* and ignores decades of legislative, judicial, and administrative history establishing the reach of the § 11341(a) exemption.

The exemption provision now found in § 11341(a) dates back to the Transportation Act of 1920. Since then, Congress has on several occasions visited the question whether the carrying out of an ICC-approved transaction must yield to rights asserted by unions under their labor agreements with the merging railroads. For one three-year period, between 1933 and 1936, Congress expressly fashioned the law to accord unions the power to block transactions by standing on the terms of their existing agreements and their rights under the RLA.[12] But Congress has otherwise unswervingly denied this power to the unions.[13] Congress carefully studied the entire matter in passing the Transportation Act of 1940, when it explicitly

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[12] Emergency Railroad Transportation Act of 1933, ch. 91, tit. I, § 10(a), 48 Stat. 211, 215.

[13] Compare, for example, § 10(a) of Title I of the Emergency Railroad Transportation Act with § 202 (15) of Title II of that statute, 48 Stat. 219.

rejected a proposal—known as the Harrington amendment—that would have restored a veto power to labor. *See Railway Labor Executives' Association v. United States*, 339 U.S. 142, 151 (1950). Reflecting this congressional action, the courts of appeals, until now, have uniformly concluded that the § 11341(a) exemption reaches all rights derived from the RLA, including the right to assert claims based on labor agreements.[14] Four Justices of this Court have already reached the same conclusion. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 287 (1987) (Stevens, J., concurring). And the ICC has itself long shared the settled judicial understanding of the reach of the § 11341(a) exemption.

The Court of Appeals went out of its way to reject *sub silentio* the unequivocal legislative record and the decades of established case law and consistent administrative application. Giving force to the Court of Appeals' crabbed assessment of the scope of the § 11341(a) exemption would inevitably stymie transactions and thereby contradict the long-standing purpose of the Interstate Commerce Act to foster railroad consolidations in the interest of economy and efficiency. The decision of the Court of Appeals is unfounded and should be reversed.

[14] *E.g., Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Burlington Northern, Inc. v. American Railway Supervisors Association*, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 975 (1975); *Nemitz v. Norfolk & Western Ry.*, 436 F.2d 841, 845-46 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971).

ARGUMENT

THE INTERSTATE COMMERCE ACT, 49 U.S.C. § 11341(a), EXEMPTS A RAILROAD CARRYING OUT AN ICC-APPROVED TRANSACTION FROM THE ASSERTION AGAINST IT OF RIGHTS CLAIMED UNDER LABOR AGREEMENTS ENFORCEABLE THROUGH THE RAILWAY LABOR ACT.

The Court of Appeals misconstrued the scope of the § 11341(a) exemption "from all other law," holding that the exemption does not extend to claims asserted under labor agreements governed by the Railway Labor Act. That holding conflicts with *Schwabacher v. United States*, 334 U.S. 182 (1948) ("*Schwabacher*"); it is at odds with the repeatedly expressed intent of Congress and fundamental national policy; and it is inconsistent with the decisions of all of the other circuit courts to have considered the issue and with longstanding administrative precedent.

The railroad industry has for many years been in a greater or lesser degree of economic disarray, characterized by increased competition from other transportation modes and declining traffic, revenues, and employment. Congress' response has been to adopt, and continually to recommit itself to, a national policy of fostering railroad consolidations, in the interest of economy and efficiency.[15] Section 11341(a), and its

[15] *E.g., United States v. Lowden*, 308 U.S. 225, 232 (1939) ("As a result of the enactment of the Transportation Act in 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy"); *County of Marin v. United States*, 356 U.S. 412, 416, 417-18 (1958) (the Transportation Act of 1940 was designed "to facil-

predecessors, have been a cornerstone of this legislative design. *Schwabacher*, 334 U.S. at 190-97; *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 125 (1948).

The language of the exemption provision traces back seventy years to the Transportation Act of 1920. Section 407(8) of that Act provided that carriers affected by orders of the ICC approving consolidations:

> shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

Transportation Act of 1920, ch. 91, § 407(8), 41 Stat. 456, 482, codified as 49 U.S.C. § 5(8) ("§ 5(8)").[16] The

itate merger and consolidation in the national transportation system" and "expresse[d] clearly the desire of Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification"); *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Association*, 109 S. Ct. 2584, 2596-97 (1989) (the Railroad Revitalization and Regulatory Reform Act of 1976 and the Staggers Rail Act of 1980 were "aimed at reversing the rail industry's decline through deregulatory efforts, above all by streamlining procedures to effectuate economically efficient transactions").

[16] The complete text of the predecessors to § 11341(a) is reproduced at pages 118a-120a to the separately bound Appendix

exemption provision was reenacted in virtually identical terms in the Emergency Railroad Transportation Act of 1933;[17] and it was reenacted again in the Transportation Act of 1940, where it provided that

> any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved . . . .

Transportation Act of 1940, ch. 722, § 7(11), 54 Stat. 899, 908, codified as 49 U.S.C. § 5(11) ("§ 5(11)"). Finally, the exemption provision was recodified in 1978, without substantive change, as § 11341(a).[18]

In each version of the exemption provision, the operative language has been similar and the meaning has been constant: to effectuate the national transportation policy by immunizing carriers from collateral legal challenges to the carrying out of transactions approved by the ICC as in the public interest. The Court of Appeals' mistaken holding rejects the settled understanding of the effects of ICC

to the Petition For A Writ of Certiorari filed by CSX Transportation, Inc., in Case No. 89-1028.

[17] The text of the 1933 provision is found in note 30, below.

[18] Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978); *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 299 n.12 (Stevens, J., concurring).

approval and, to the extent it dictates adherence to the terms of existing labor agreements, threatens to prevent consolidations and thereby condemns the railroad industry to a destabilized future.

I. SECTION 11341(a) IS EFFECTIVE TO DISPLACE PRIVATE CONTRACTUAL OBLIGATIONS.

At the core of the Court of Appeals' conclusion that § 11341(a) does not apply to labor agreements is its erroneous holding that the exemption "from all other law" does not reach *contracts*. 89-1027 Pet. App. 12a, 18a.[19] The Court of Appeals' interpretation of § 11341(a) is foreclosed by this Court's decision in *Schwabacher*, which held that former § 5(11) of the Interstate Commerce Act, the direct predecessor of § 11341(a), relieved carriers from private contractual obligations, to the extent necessary to carry out an ICC-approved transaction. 334 U.S. at 185-89, 194-95, 199-201.

Schwabacher involved a challenge to an ICC order approving the merger of the Pere Marquette Railway Company with another carrier, brought by a group of dissenting Pere Marquette preferred stockholders. In the ICC approval proceeding, these stockholders claimed that under the Pere Marquette charter, which was enforceable under the laws of Michigan, they were entitled to receive at least $172.50 per share of stock; and they objected to the proposed merger plan because it allocated them substantially less than this amount and thereby deprived them "of contract rights under Michigan law. . . . " 334 U.S. at 188. The ICC

[19] No party to this case made such an argument and the Court of Appeals embraced it without benefit of briefing or oral argument on the point.

approved the proposed merger plan but left the stockholders to pursue in state court their claims for monies owed under the terms of the charter. *Id.*

This Court rejected the ICC's approach and, relying, *inter alia*, on § 5(11), held that once the ICC approved the merger, the surviving carrier was relieved from any claims for additional payments based on rights assertedly conferred by the Pere Marquette charter. 334 U.S. at 194-95; 201-02.

The Court of Appeals wrongly thought *Schwabacher* was concerned with the ICC's authority "to override state law," by which the court meant state statutory law, "granting dissenting shareholders [the] right to block [a] merger." 89-1027 Pet. App. 21a. This reading of *Schwabacher* is insupportable. Although *Schwabacher* contains many references to Michigan or state law, the decision does not involve any state statute conferring a substantive right on the preferred stockholders, let alone a right to block the merger.

The references to state law in *Schwabacher* relate to only two subjects: (1) the question whether, as a matter of Michigan law, the merger effected a "winding up" of Pere Marquette, as it was this event that would trigger rights under the express terms of the charter; and (2) the availability of the state court system to hear and decide the claims asserted by the stockholders under their private contract with the Pere Marquette. The sole source of the dissenting stockholders' claimed right to receive $172.50 per share was the promise made in the charter, and it was this contractual promise that, by operation of § 5(11), was abrogated.[20]

[20] This Court expressly recognized that "Michigan law pro-

All of this is evident from the face of the opinion in *Schwabacher*. But the point is buttressed by consideration of the underlying ICC decision approving the Pere Marquette merger and of the parties' presentation of the case in this Court. In its approval decision, the ICC had concluded that "[w]hether dissenting stockholders, as members of a class created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette, is a question not within our province to decide." *Pere Marquette Railway Merger, Etc.*, 267 I.C.C. 207, 248 (1947) (citation omitted). In this Court, the ICC framed the question presented as:

> Whether, in passing upon the agreement of merger here involved, . . . the Commission was required, as a condition to its approval of the merger under the provisions of Section 5 (2-13), and Section 20a (1-11) of the Interstate Commerce Act, to adjudicate and enforce the claimed contractual rights, arising

vide[d] no specific right or procedure for appraisal and retirement of the holdings of a stockholder dissenting from a railroad merger." 334 U.S. at 185. The applicable Michigan merger statute merely ensured that the surviving company was required to honor the preexisting obligations of the merging companies: the "debts, liabilities and duties" of the merged companies "shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it." Michigan Statutes Annotated, § 22.234, quoted in *Schwabacher*, Brief for Appellants at 9. When the *Schwabacher* Court spoke of state law imposing financial obligations on the surviving carrier, *e.g.*, 334 U.S. at 201, it was referring to the possibility that the Michigan courts might uphold the stockholders' claim under their contract.

> under State law, of dissenting stockholders as a separate and distinct class. . . .

Schwabacher, Brief for Appellee ICC at 2. The dissenting Pere Marquette shareholders agreed that the rights they sought to have the ICC enforce were contractual in nature.[21]

This Court concluded that neither party's view of the working of the statutory scheme was correct. 334 U.S. at 189-90. Instead, the Court held that the ICC had exclusive authority to determine the rights of stockholders notwithstanding the provisions of their private contract with the corporation, and that the ICC's approval of the merger supplanted the state court remedies that otherwise would have been available to those stockholders to vindicate their putative right to $172.50 per share under the letter of the contract.[22]

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[21] See *Schwabacher*, Brief for Appellants at 2; *Schwabacher*, Reply Brief for Appellants at 2 ("Appellants have stated the question here as whether the Commission unlawfully declined to take jurisdiction (question presented, brief 2). The Commission states the question similarly, as whether it was required 'to adjudicate and enforce the claimed contractual rights * * * of dissenting stockholders.' " (footnote omitted)).

[22] *Schwabacher* also establishes that in approving a merger the ICC is required by 49 U.S.C. §§ 5(2)(b) and 20a (now 49 U.S.C. §§ 11344(a), (c) and 11301) to find that the merger terms are just and reasonable to stockholders, as measured by the fair economic value of their stock. 334 U.S. at 198-99. There would be no warrant for reading *Schwabacher* as encompassing only the operation of the ICC's approval authority, not its exemption authority, and *Schwabacher* has not been read that way. To the contrary, four Justices of this Court have understood *Schwabacher* to be construing the § 5(11) (now § 11341(a)) exemption, *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. at 298-

Our understanding of *Schwabacher* is not new. The Court of Appeals itself has previously agreed with it. *Altman v. Central of Georgia Ry.*, 488 F.2d 1302 (D.C. Cir. 1973) (claims for payment of dividends allegedly due under the terms of a railroad's charter and bylaws are barred). *See also Snow v. Dixon*, 362 N.E.2d 1052 (Ill.), *cert. denied*, 434 U.S. 939 (1977); *St. Louis Southwestern Ry. v. City of Tyler*, 422 S.W.2d 780 (Tex. Civ. App. 1967). And since *Schwabacher*, the ICC has routinely asserted its authority, under the exemption provision, to override contractual obligations.[23]

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99 (Stevens, J., concurring), as have the lower federal courts, *e.g., Deutsch v. Flannery*, 883 F.2d 60, 62-63 (9th Cir. 1989), the state courts, *e.g., Bruno v. Western Pacific R.R.*, 498 A.2d 171, 174 (Del. Ch. 1985), *aff'd*, 508 A.2d 72 (Del. 1986), *cert. denied*, 482 U.S. 927 (1987), and the ICC, *e.g., St. Louis Southwestern Ry. Lease*, 290 I.C.C. 205, 212-13 (1953). No other reading of *Schwabacher* is possible, for this Court was there plainly ruling on the effect that, by operation of § 5(11), the approval of the Pere Marquette merger carried with it: the extinguishing of the stockholders' right to pursue their contract claim.

[23] *E.g., Missouri Pacific R.R.—Merger—Texas & Pacific Ry.*, 348 I.C.C. 414, 430 (1976), *rev'd on other grounds sub nom. City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977) (assuming *arguendo* that ICC has authority to abrogate contracts, but concluding that ICC's exercise of this power in the circumstances was incorrect), *cert. denied*, 435 U.S. 950 (1978); *Southern Pacific Co. Merger, Etc., Texas & New Orleans R.R.*, 312 I.C.C. 598, 602 (1961); *St. Louis Southwestern Ry. Lease*, 290 I.C.C. 205, 211-13 (1953).

The Court of Appeals incorrectly suggested, 89-1027 Pet. App. 13a, that in *Gulf, Mobile & Ohio R.R.—Abandonment*, 282 I.C.C. 311 (1952), the ICC disclaimed authority, under 49 U.S.C. § 5(11), to abrogate contracts. The decision was precisely to the contrary. *Gulf, Mobile* was an abandonment case; § 5(11) (like

The Court of Appeals was content to leave transactions that have been approved as in the public interest under 49 U.S.C. §§ 11343-44 vulnerable to defeat through claims asserted under private contracts because it did not think that the phrase "all other law" encompassed "contracts." 89-1027 Pet. App. 12a, 18a.[24] Precedent aside, even considered as

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today's § 11341(a)) applied to mergers and consolidations, not abandonments. The ICC held, in *Gulf, Mobile*, that it could not abrogate contracts in abandonment cases because it could do so "only upon a clear grant of statutory authority similar to that contained in section 5(11)." 282 I.C.C. at 335. Moreover, the ICC subsequently determined that private contracts could not stand in the way of its authority to approve abandonments. *E.g., Fort Dodge, Des Moines & Southern Ry. Abandonment*, 312 I.C.C. 708, 710-11 (1961) ("The existence of a private contract for continued service between a carrier and a shipper is not sufficient to prevent abandonment of the line, if the facts so warrant. The power of Congress over interstate commerce is unrestricted by the obligations of private contracts and our decision may not be affected thereby."); *see also Missouri Pacific R.R.—Abandonment Exemption—In Marion County, IL*, Docket No. AB-3 (Sub-No. 77X), decision served November 10, 1988.

[24] The Court of Appeals expressed concern that if the law were otherwise, the ICC "could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors," 89-1027 Pet. App. 13a. In fact, there has been no doubt since *Schwabacher* that the ICC does have precisely that power, within the other confines of § 11341(a). Indeed, the main difference between the "solemn undertaking" hypothesized by the Court of Appeals and the "solemn undertaking" embodied in the Pere Marquette charter at issue in *Schwabacher* is that, of the two, the latter posed the *lesser* threat to the carrying out of an approved transaction. As the Court acknowledged in *Schwabacher*, the ICC had there found that even if the dissenting Pere Marquette stockholders' contractual claims were sustained by the Michigan

an original matter there is nothing to be said for that conclusion; it artificially restricts the operative statutory language and runs counter to the goals the exemption has always sought to promote.[25] But this

courts, the amount involved would "not impair the carrier's ability to perform its services" after the merger, 334 U.S. at 197—a fact that the dissenting Justices thought sufficient to preclude the application of § 5(11), 334 U.S. at 207 (Frankfurter, J., dissenting), but that the Court did not.

[25] The Court of Appeals, loosing the phrase "all other law" as it now appears in § 11341(a) from its textual source, took the statutory language to comprehend only "positive enactments," 89-1027 Pet. App. 18a, and chastised the ICC for seeing in it a broader reference to " 'all legal obstacles.' " 89-1027 Pet. App. 13a. The Court of Appeals apparently forgot that the immediate predecessor to § 11341(a), the former § 5(11), exempted carriers "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal." This language is traceable directly to the original 1920 provision (the former § 5(8)) and removes any doubt that the exemption encompasses not merely positive enactments but *all* restraints, limitations, and prohibitions of law—all "legal obstacles" to the carrying out of a transaction. The 1978 recodification of § 5(11) as § 11341(a) did not effect any substantive change in the exemption provision.

Further, even considered on its own, the phrase "all other law" plainly is broad enough to encompass claims founded on a private contract. The common law, no less than statutory law, is "law" within the ordinary meaning of the term. *E.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 99-101 (1972) ("we see no reason not to give 'laws' its natural meaning . . . and therefore conclude that [28 U.S.C.] § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin"); *Warren v. United States*, 340 U.S. 523, 526 (1951) (the "term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts"); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938). It is precisely because contracts create obligations that are legally enforceable that contracts could, if allowed, interfere with the carrying out of an approved transaction.

Moreover, the Court of Appeals' conclusion that the exemption covers only "positive enactments" is inherently implausible. Under that interpretation, a railroad's attempt to carry out a transaction, though exempt from suit under the antitrust statutes, would remain subject to attack under myriad state common law rules respecting unfair competition or unreasonable restraints of trade. It is unthinkable that Congress left such a gaping hole in its effort to ensure "the maintenance of an adequate rail transportation system," *United States v. Lowden*, 308 U.S. 225, 230 (1939).

is not an original matter. It has been understood for forty-two years that private contractual claims are barred by the statutory exemption as authoritatively interpreted by this Court in *Schwabacher*.

II. SECTION 11341(a) IS EFFECTIVE TO DISPLACE RIGHTS DERIVED FROM THE RAILWAY LABOR ACT.

A. Seven Decades Of Legislative, Judicial, And Administrative History Establish That § 11341(a) Displaces RLA-Derived Rights.

The § 11341(a) exemption "from all other law" indisputably extends to collective bargaining agreements existing under the Railway Labor Act. Because, as *Schwabacher* holds, the statutory exemption applies to purely private contracts, it certainly applies to contracts, like those in question here, that are themselves constructs of federal statutory law.

The Court of Appeals likened railroad labor agreements to contracts governed by "common law rules of liability," 89-1027 Pet. App. 18a, and went on from there to attempt to drive a wedge between the "override" of such labor agreements and the "override" of the RLA. This was simply wrong. Railroad labor

agreements are not governed by the common law. Collective bargaining agreements in the railroad industry are creatures of the RLA and have no meaning apart from the rights and obligations that statute bestows; the RLA prescribes the procedures for creating agreements and the exclusive means of enforcing them. *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972) (railroad labor agreements are not enforceable in state court); *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. at 156 (RLA, 45 U.S.C. § 152 Seventh, "operates to give legal and binding effect to collective agreements").[26] The dichotomy the Court of Appeals sought to create between railroad labor agreements and the federal statute obligating adherence to their terms has not been recognized and is not valid. A well-elaborated legislative and judicial history definitively establishes that the question whether the exemption provision applies to labor agreements is inextricably linked with the question whether it applies to the RLA. And it is established that § 11341(a) is effective to override both the agreements and the statute.

That conclusion will come as no surprise to this Court; four Justices have already expressly reached it. Justices Stevens, Brennan, Marshall, and Blackmun, concurring in the judgment in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 287 (1987) (Stevens, J., concurring) ("*ICC v. BLE*"), have agreed that § 11341(a) is effective to displace the RLA

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[26] *See also Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. 570, 576-78 (1971) (obligation to "maintain" agreements is founded on RLA); *California v. Taylor*, 353 U.S. 553, 561 (1957) (railroad labor agreements supersede state law).

and that the power to modify or override labor agreements is encompassed in the § 11341(a) exemption. In *ICC v. BLE*, as here, what was at stake was precisely the claim of certain railroad employees that the "Railway Labor Act . . . and their collective bargaining agreements" gave them the right to perform certain work. 482 U.S. at 295 (Stevens, J., concurring). The concurring Justices would have rejected that claim because of the § 11341(a) exemption, explaining:

> [Section] 11341 automatically exempts a person from "other laws" whenever an exemption is "necessary to let that person carry out the transaction. . . . " 49 U.S.C. § 11341. The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable.

482 U.S. at 298 (citing *Schwabacher*; footnote omitted).[27]

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[27] In *ICC v. BLE*, a majority of a panel of the District of Columbia Circuit had remanded the case to the ICC, directing the agency to make specific findings as to the necessity of an override of RLA-derived rights, including rights assertedly based on labor agreements, in the particular case. *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985). This Court vacated the Court of Appeals' decision on the ground that the appeal of the ICC decision had been untimely and that the Court of Appeals accordingly lacked jurisdiction. The four concurring Justices would have reached the merits of the case and concluded that the § 11341(a) exemption is self-executing and therefore does not require specific findings as to the necessity of an override of RLA rights, including rights claimed to arise under labor contracts. 482 U.S. at 298.

The conclusion reached by the four concurring Justices in *ICC v. BLE* is exactly the one contemplated by the Court in *United States v. Lowden*, 308 U.S. 225 (1939) ("*Lowden*"). *Lowden* upheld the ICC's authority to impose labor protection when approving a railroad consolidation, prior to enactment of the first statutory requirement for such protection. As the *Lowden* Court explained, protective arrangements were appropriate in significant part because railroad consolidations necessarily result in the abridgment of rights previously held under existing labor agreements:

> [T]he Commission has estimated in its report on the unification of the railroads that 75% of the savings will be at the expense of railroad labor. Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions. It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation. . . .

308 U.S. at 233. These inevitable effects on employees justified the imposition of compensatory labor protection as "an essential aid to the maintenance of a service uninterrupted by labor disputes." *Id.* at 235-36.

The application of § 11341(a) to all RLA-derived rights is precisely what Congress intended. The legislative record makes it clear that Congress has always understood that the Interstate Commerce Act's exemption provision will cause both the RLA and agreements negotiated under that statute to yield to the carrying out of an approved transaction.

Congress' purpose is revealed dramatically and unequivocally in the Emergency Railroad Transportation Act of 1933 ("ERTA"). Title I of ERTA was *temporary* legislation, ultimately of three years duration, that responded to the extraordinary circumstances created by the Depression. *See generally St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 317 (1954).[28] Section 10(a) of ERTA Title I contained an exemption from "restraints or prohibitions by law, State or Federal," similar to that found in the Transportation Act of 1920 (then 49 U.S.C. § 5(8)), to which Congress added the limitation that

> nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.

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[28] Originally enacted for one year, Title I was extended for an additional year by Presidential proclamation, Proclamation No. 2082 (May 2, 1934), and for a third year by Congress. S.J. Res. 112, 74th Cong., 1st Sess., 79 Cong. Rec. 9346 (1935).

48 Stat. at 215.[29] Quite plainly, there would have been no need for this specific limitation if the exemption provision, by its terms, did not reach the RLA and labor agreements in the first place.

At the same time, Congress did *not* carve out a special exception for the RLA or labor agreements from the exemption from "all other restraints or prohibitions by or imposed under authority of law, State or Federal," contained in § 202(15) of the *permanent* Title II of ERTA, which was an amendment to the Interstate Commerce Act. That provision was substantially identical to the exemption provision found in the 1920 Act.[30] It is this unqualified exemption

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[29] Title I of ERTA established a federal railroad coordinator to encourage carriers to eliminate unnecessary expenses and duplication of services. S. Rep. No. 87, 73rd Cong., 1st Sess. 1 (1933). The restrictive proviso quoted in text was the last part of Section 10(a) of ERTA Title I, which otherwise provided:

> The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or Commission made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws, as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, in so far as may be necessary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however*, That nothing. . . .

[30] Section 202(15) of ERTA Title II provided:

> The carriers and any corporation affected by any order made under the foregoing provisions shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

Emergency Railroad Transportation Act, ch. 91, tit. II, § 202(15), 48 Stat. 211, 219, codified as 49 U.S.C. § 5(15) ("§ 5(15)").

provision, codified as 49 U.S.C. § 5(15), that was a forerunner of § 11341(a). This Court has previously recognized, in construing the reach of the exemption provision, that differences between Title I and Title II of ERTA "indicate an intentional distinction." *Texas v. United States*, 292 U.S. 522, 534 (1934) (contrasting the all-encompassing exemption contained in § 202(15) of Title II with a provision in Title I expressly guaranteeing that carriers would not be relieved from contractual agreements to keep offices in particular locations).

Congress reaffirmed its purpose in the Transportation Act of 1940, in two principal ways. First, Congress reenacted (as 49 U.S.C. § 5(11)) the broad exemption from "the operation . . . of all . . . restraints, limitations, and prohibitions of law, Federal, State, or municipal . . . , " without any exception for the RLA or labor agreements.[31] This provision was

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[31] The 1940 Act also provided "additional proof," if any were needed, of Congress' intent to grant the ICC an adequate exemption power, by making the ICC's jurisdiction over transactions "exclusive and plenary." *Seaboard Airline R.R. v. Daniel*,

later recodified as § 11341(a), without substantive change.

Second, Congress, in enacting the predecessor to 49 U.S.C. § 11347, which placed a statutory foundation under labor protection, rejected a proposal known as the Harrington amendment. Under the Harrington amendment, consolidations would have been permitted to occur only if all rights under the RLA and labor agreements were preserved, and no jobs were lost; the amendment proposed to bar the ICC from approving any transaction that would "result in unemployment or displacement of employees of the carrier or carriers, *or in the impairment of existing employment rights* of said employees." 84 Cong. Rec. 9882 (1939) (emphasis added). The Harrington amendment essentially sought to return to the situation that had existed under the temporary ERTA Title I. Before it expired, Title I of ERTA had both placed the RLA and labor agreements outside the scope of its exemption provision and also provided for a job freeze;[32] the Harrington amendment echoed those provisions. *See Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169, 173-76 (1961); *Railway Labor Executives' Association v. United States*, 339 U.S. at 150 & n.13.

Congress rejected the Harrington amendment, just as it earlier had chosen not to enact the ERTA Title

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333 U.S. 118, 125 (1948).

In addition, the 1940 Act relieved the ICC of the responsibility it had under the 1920 Act to promulgate a national consolidation plan, and instead left "the power to initiate mergers and consolidations . . . completely in the hands of the carriers." *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. at 319.

[32] ERTA, ch. 91, tit. I, § 7(b), 48 Stat. 211, 214.

I restrictions as permanent legislation. Instead, Congress enacted what became 49 U.S.C. § 5(2)(f), the predecessor to § 11347, requiring the ICC, in approving a transaction, to provide a "fair and equitable arrangement to protect the interests of the [affected] employees." The Harrington amendment had

> introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related.

Railway Labor Executives' Association v. United States, 339 U.S. at 151. The defeat of the Harrington amendment confirmed Congress' intent to permit railroads to carry out approved transactions that cause changes in existing labor agreements, but to ensure that affected employees receive fair compensation under the ICC's protective conditions. *See id.* at 147-54; *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37, 42 (1971).

The Court of Appeals missed all of this and instead narrowly directed most of its inquiry to the legislative history of the Transportation Act of 1920, 89-1027 Pet. App. 17a-18a, while professing itself unable to find any later suggestion that Congress meant to bring collective bargaining agreements "within the reach of the statute," 89-1027 Pet. App. 19a. The Court of Appeals not only misread the history of the 1920 Act,[33] but was obviously wrong in proceeding as

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[33] It is evident, as the Court of Appeals noted (89-1027 Pet.

though § 11341(a)—which has been reenacted several times over the past seventy years—is effectively cab-

App. 14a-17a), that when Congress enacted the exemption provision in 1920 (then codified as 49 U.S.C. § 5(8)), it did so to relieve consolidating carriers from the restraints of the federal antitrust laws and of state corporation and transportation statutes. But it is equally evident that had Congress meant the exemption to apply only to those particular statutes, it would not have enacted the provision it did, which broadly encompassed "*all* other restraints or prohibitions by law, State or *Federal*," 41 Stat. 482 (emphasis added). *See Texas v. United States*, 292 U.S. 522, 534-35 (1934); *see generally Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983) (the absence of a specific "congressional focus is immaterial where the plain language applies"); *United States v. Bornstein*, 423 U.S. 303, 309-10 (1976) (same).

The Court of Appeals also observed that Title III of the 1920 Act, ch. 91, 41 Stat. 456, 469, created a framework for the regulation of collective bargaining in the railroad industry, and suggested that it found nothing in the Act's legislative history to indicate that the exemption provision applied to Title III. 89-1027 Pet. App. 18a, 23a. But the Court of Appeals has the analysis backwards. The exemption provision, by its clear terms, covered all restraints of federal law, and Title III was indisputably a federal law. That the exemption provision did not expressly refer to Title III does not demonstrate ambiguity, but breadth. *See generally United States v. Monsanto*, 109 S. Ct. 2657, 2663 (1989) ("Congress' failure to supplement [21 U.S.C.] § 853(a)'s comprehensive phrase—'*any* property'—with an exclamatory 'and we even mean assets to be used to pay an attorney' does not lessen the force of the statute's plain language"; emphasis in original). There is no basis—and certainly no need—for looking beyond a statutory provision that is plain on its face to see if Congress happened to repeat in the legislative history what it unambiguously enacted as the law. If anything, the presence of Title III in the 1920 Act simply shows that the Congress that enacted the exemption provision unquestionably knew that the body of federal law included a statute governing relations

ined by the particular circumstances that Congress confronted in 1920, *see McLean Trucking Co. v. United States*, 321 U.S. 67, 78-79 (1944) (expansive language of § 5(11) refutes contention that because motor carriers faced less severe economic circumstances in 1935 than did railroads in 1920, scope of § 5(11) is narrower for motor carriers than for railroads); *Deutsch v. Flannery*, 883 F.2d 60, 62-63 (9th Cir. 1989) (§ 11341(a) bars claims under Securities Exchange Act of 1934). *See generally Ngiraingas v. Sanchez*, 58 U.S.L.W. 4504, 4506 (U.S. April 24, 1990) (No. 88-1281) ("successive enactments" of statute, "in context," indicate congressional intent).[34]

between labor and management in the railroad industry. The significance of the legislative history of the 1920 Act in this respect is that it does *not* reveal any congressional intent to remove Title III from the coverage of the broad language of what became § 5(8). *See generally Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980) (absent a clearly expressed legislative intention to the contrary, language of the statute must be regarded as conclusive).

Moreover, contrary to the Court of Appeals' apparent belief (89-1027 Pet. App. 18a, 23a), there is obviously no inconsistency in Congress' having enacted Title III and simultaneously made it subject to the exemption provision. Title III created a Railroad Labor Board as a means for the peaceful settlement of labor controversies between carriers and their employees. *See Pennsylvania R.R. v. United States Railroad Labor Board*, 261 U.S. 72, 79 (1923). The functions of the Labor Board were *not* tied to the ICC's authority over transactions; rather, they covered ordinary day-to-day relations between labor and management. The Labor Board, whose decisions were not supported by legal sanction in any event, *id.* at 79-80, was empowered to carry out its assigned functions except when to do so would conflict with the carrying out of a railroad consolidation subject to § 5(8).

[34] The Court of Appeals also looked to the legislative history

In accordance with the dispositive legislative history, the courts of appeals, beginning with *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), *aff'g* 202

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of the Railway Labor Act of 1926, but it misunderstood that history as well. The court mistakenly relied on Congress' rejection, in 1926, of a proposed amendment to the bill that became the RLA that would have permitted the ICC to suspend wage agreements it believed were not in the public interest.

The Court of Appeals purported to find in language quoted from a 1926 Senate Report—" 'there was a fundamental objection to making changes of a substantive nature in the agreement which the parties had reached' "—specific evidence of congressional hostility to ICC interference with negotiated wage agreements. 89-1027 Pet. App. 18a. But the quoted passage in fact did not address this subject at all. The "agreement" to which the Senate Report referred was not a negotiated wage agreement (or such agreements in general), but, rather, the overall agreement between management and labor *as to what the RLA as a whole should say*. The quoted passage simply affirmed that the new RLA should ratify, and not change the terms of, the national legislative compact between management and labor. S. Rep. No. 606, 69th Cong., 1st Sess. 6 (1926), *reprinted in* 1 *Railway Labor Act of 1926, Legislative History* at 100, 105 (M. Campbell & E. Brewer, III, eds. 1988). *See generally International Association of Machinists v. Street*, 367 U.S. 740, 758 (1961).

What the Senate Report actually said about the proposed amendment to the RLA bill was that it would embroil the ICC in a "field of controversy" and thereby impair the ICC's effectiveness. S. Rep. No. 606, at 6, *reprinted in* 1 *Railway Labor Act of 1926, Legislative History* at 105. In any event, the proposed amendment was *not* related to the ICC's jurisdiction over transactions, but would have given the ICC a roving commission to suspend wage agreements generally. The amendment's rejection provides no evidence that Congress intended (either prior to or after 1926) to exclude the RLA, and labor agreements enforceable under it, from the reach of the exemption provision.

F. Supp. 277 (S.D. Iowa 1962), *cert. denied*, 375 U.S. 819 (1963) ("*BLE v. C&NW*"), have, until now, uniformly concluded that the exemption provision now found in § 11341(a) reaches all rights derived from the RLA.

In *BLE v. C&NW*, the Eighth Circuit held that former § 5(11) exempted a railroad carrying out an ICC-approved transaction from the assertion against it of rights claimed under the RLA, including rights based on collective bargaining agreements. 314 F.2d at 426, 431-33. In that case, the union had argued that § 5(11) "only purports to relieve the railroad of 'restraints' or 'limitations' or 'prohibitions' of law and does not purport to relieve the railroad of its contractual obligations"—there, the railroad's asserted obligation to respect seniority rights arising by virtue of certain labor contracts. 202 F. Supp. at 283. The district court, citing *Schwabacher*, rejected the union's arguments. 202 F. Supp. at 284. The Eighth Circuit, though not mentioning *Schwabacher* explicitly, affirmed the district court in all respects, explaining that to hold otherwise "would be to disregard the plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law." 314 F.2d at 431-32. The Eighth Circuit further reasoned that excluding RLA-derived rights from the reach of the § 11341(a) exemption would "threaten to prevent many consolidations," 314 F.2d at 431, and thereby produce the very result that Congress had repudiated in 1940 by rejecting the Harrington amendment, *id.* at 430-31. *Accord Missouri Pacific R.R. v. United Transportation Union*, 782

F.2d 107, 111-12 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987).[35]

All the other circuits to have considered the issue have followed *BLE v. C&NW* in similarly concluding that rights asserted under the RLA are subordinate to the Interstate Commerce Act's exemptive provision. *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Burlington Northern, Inc. v. American Railway Supervisors Association*, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 975 (1975); *Nemitz v. Norfolk & Western Ry.*, 436 F.2d 841, 845-46 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971). In so deciding, none of these courts distinguished between rights claimed under the RLA and those claimed under labor agreements enforceable through that statute. To the contrary, these courts, like the four concurring Justices in *ICC v. BLE*, all treated these RLA-derived rights as of a piece, never doubting that the exemption "from all other law" immunizes a railroad against all RLA-based challenges to the carrying out of an ICC-approved transaction.[36]

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[35] In a somewhat different context, the Eighth Circuit, without reference to its own prior decisions and without any independent analysis, has subsequently favorably cited the conclusion of the Court of Appeals that the ICC purportedly lacks the power to override the provisions of a labor agreement. *Brotherhood of Locomotive Engineers v. ICC*, 885 F.2d 446, 449-50 (8th Cir. 1989).

[36] The circuit courts have reached similar results in cases arising in the airline industry, which is subject to the RLA, even though the statutory scheme governing consolidations in that industry did not contain an exemption provision comparable to § 11341(a). Every court to consider the question held that the RLA, and labor agreements entered into under it, must yield to the Civil Aeronautics Board's authorization of a transaction, subject to employee protective conditions. *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir), *cert. denied*, 429 U.S. 961 (1976); *International Association of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972); *American Airlines, Inc. v. CAB*, 445 F.2d 891, 896-97 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Kent v. CAB*, 204 F.2d 263, 266 (2d Cir.) ("[a] private [labor] contract must yield to the paramount power of the [CAB] to perform its duties under the statute creating it to approve mergers"), *cert. denied*, 346 U.S. 826 (1953).

This same understanding of the reach of the § 11341(a) exemption has been a pillar of ICC regulation for many years. The ICC explicitly stated as long ago as 1974 that the exemption provision is effective to displace RLA-derived rights:

> . . . RLEA's assertion that the [NW merger protective] agreement and the wages, rules, and working conditions governed by the Railway Labor Act may not be changed except in accordance with the procedures prescribed by that act is squarely refuted by the language of section 5(11) of the Interstate Commerce Act which confers exclusive and plenary jurisdiction upon this Commission to approve mergers and relieve carriers from all other restraints of Federal law. The Railway Labor Act is a Federal act and is thereby preempted by section 5(11). Thus the Commission may relieve the railroad from the requirements of that act insofar as is necessary to carry into effect the transaction approved pursuant to section 5(2).

Norfolk & Western Ry. and New York, Chicago & St. Louis R.R.—Merger, Etc., 347 I.C.C. 506, 511-12 (1974). When called upon to do so, the ICC elaborated upon the basis for its position, reiterating its view that § 11341(a) encompasses rights claimed under labor agreements. *E.g., Denver & Rio Grande Western R.R.—Trackage Rights—Missouri Pacific R.R.*, Finance Docket No. 30,000 (Sub-No. 18), decision served October 25, 1983, slip op. at 6 ("[t]o the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction") ("*DRGW*"), *appeal dismissed sub nom. ICC v. BLE*, 482 U.S. 270 (1987). The interpretation of § 11341(a) adhered to by the ICC in our case is fully in accord with the ICC's established jurisprudence;[37] that sta-

[37] The Court of Appeals' decision to remand the question whether § 11341(a) extends to rights asserted under the RLA for further explanation is premised on a misreading of the ICC's precedents and invokes no sound principle of administrative law. The Court of Appeals mistakenly thought (89-1027 Pet. App. 22a) that the ICC first took the position that § 11341(a) applies to the RLA in 1983, in *DRGW*, and that this position deviated without explanation from a position the ICC had adopted in 1967 in *Southern Ry.—Control—Central of Georgia Ry.*, 331 I.C.C. 151 (1967) ("*Southern Control*"). But neither point is true. As we have just shown, the ICC had expressly said *in 1974* that § 11341(a) overrides RLA-derived rights. *Norfolk & Western Ry.and New York, Chicago & St. Louis R.R.—Merger, Etc.*, 347 I.C.C. 506, 511-12 (1974). Moreover, the Court of Appeals' reading of *Southern Control* ignores that the whole point of that decision was to make clear that employees could *not* invoke RLA rights in connection with the carrying out of an approved transaction. 331 I.C.C. at 162-64, 171. Indeed, the ICC observed that, if not displaced, the RLA "would seriously impede mergers."

tutory interpretation is not only permissible, but clearly correct. It is entitled to deference. *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

The restrictive reading of § 11341(a) adopted by the Court of Appeals defies history, decades of clear legislative intent, and the previously uniform understanding of the courts and the ICC; its application would defeat the purpose that the exemption provision is intended to serve. The scope of the § 11341(a) exemption must be measured by Congress' aim of promoting economy and efficiency in interstate transportation. *Texas v. United States*, 292 U.S. at 534-35. *See Escanaba & Lake Superior R.R. v. United States*, 303 U.S. 315, 320 (1938) (provisions in Transportation Act of 1920 governing consolidations "are to be given liberal construction in aid of the purposes Congress had in mind"). There can be no doubt that a requirement of unquestioned adherence to existing labor agreements—or a requirement that approved transactions not be implemented until the RLA § 6 procedures for the negotiation of changes in existing agreements have been exhausted—would stifle the

Id. at 171.

Following the decision of the Court of Appeals, the ICC initially professed to accept the court's instruction that the § 11341(a) exemption does not reach labor agreements. *Brandywine Valley R.R.—Purchase—CSX Transportation, Inc.*, 5 I.C.C.2d 764, 772 n.5 (1989), *appeal docketed*, No. 89-1503 (D.C. Cir. Aug. 21, 1989). Because the Court of Appeals was wrong, the ICC's initial acquiescence in the court's holding has no force. Moreover, in subsequent administrative proceedings in which no formal decisions have yet been rendered, the ICC has apparently receded from its initial position in *Brandywine*.

continuing implementation of already-approved railroad consolidations and the undertaking of new ones.

Indeed, under the Court of Appeals' decision, labor unions would effectively be given the right to exercise the power of veto over the carrying out of transactions the ICC has approved as in the public interest. That the Court of Appeals understood it was extending this power to unions is demonstrated by the Court's own laconic suggestion that NW and Southern might now simply prefer to undo the transfer of power distribution work at issue here in light of the court's holding that § 11341(a) is not effective to "set aside" any agreements that " 'would have prevented the consolidation from going forward.' " 89-1027 Pet. App. 25a.

Other courts of appeals and the ICC have long recognized that unless a railroad seeking to carry out an approved transaction is exempt from the assertion against it of rights claimed under the RLA, achievement of the national purpose of facilitating consolidations would be frustrated. Obviously, if an existing collective bargaining agreement contains terms that restrict a consolidation of work that implements an approved transaction, strict compliance with those terms will impede (if not thwart entirely) the carrying out of the transaction.

Resort to the RLA § 6 process for changing agreements would not provide an answer. The RLA's procedures are "purposely long and drawn out," *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966), and exhaustion of them is "an almost interminable process," *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. at 155. Moreover,

the point of the RLA is precisely *not* to force parties to agreement. Under the RLA, unless both parties voluntarily agree to arbitration, "no authority is empowered to decide the dispute." *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. at 725.[38] Accordingly, if rights can be asserted under the RLA, consolidations will inevitably be threatened, for it would then be "possible for either party to completely block any change in working conditions by refusing to agree to a change and refusing to agree to arbitrate." *BLE v. C&NW*, 314 F.2d at 431; *accord Nemitz v. Norfolk & Western Ry.*, 436 F.2d at 845; *Maine Central R.R., et al.—Exemption*, Finance Docket No. 30532, decision served September 13, 1985, slip op. at 7 (since, under the RLA, "there is no mechanism for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected"), *aff'd mem. sub nom. Railway Labor Executives' Association v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987); *DRGW*, slip op. at 6 (if ICC approval "did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified"),

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[38] Under section 6 of the RLA, 45 U.S.C. § 156, a party proposing to change "rates of pay, rules, or working conditions," must give notice to the other side and then negotiate over the proposed changes. If agreement is not reached, the process continues through mediation, voluntary arbitration, and conciliation. Throughout the process, the status quo must be maintained. The parties are not compelled to agree, however, and if in the end they cannot, they are free to resort to self-help. *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 109 S. Ct. 2477, 2480 (1989).

Until now it has been thought "inconceivable," *Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d at 112, that § 11341(a) should be read so as to preserve to labor the ability to veto the carrying out of a transaction the ICC has found to be in the public interest. That unsurprising conclusion directly reflects the intent of Congress, which has twice explicitly denied such power to labor;[39] it is inherent in this Court's decision in *Lowden* and has been explicitly endorsed by the four concurring Justices in *ICC v. BLE*.[40] The contrary holding of the Court of Appeals is wrong.

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[39] At the same time, Congress has ensured that the interests of railroad employees are protected in consolidation transactions notwithstanding the operation of § 11341(a). Congress has instructed ~~the ICC~~ to consider "the interests of carrier employees affected by the proposed transaction," 49 U.S.C. § 11344(b)(1)(D), when considering a proposed merger or consolidation and, in § 11347, has mandated labor protective conditions to provide compensation for the changes in work arrangements that, as this Court recognized in *Lowden*, inevitably result from consolidations and related transactions. The "fair arrangement" now mandated by § 11347 includes wage protection for up to six years; and the ICC may, if circumstances warrant, impose a greater level of protection in favor of employees. Finally, the § 11341(a) exemption operates only as necessary to permit the carrying out of an approved transaction.

[40] Nothing in *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Association*, 109 S. Ct. 2584 (1989), is to the contrary. That case involved a sale of rail assets to a newly formed "noncarrier" entity carried out under 49 U.S.C. § 10901. The transaction was not covered by the provisions of the Interstate Commerce Act governing consolidations of rail carriers, and the § 11341(a) exemption did not apply. Further, the transaction was similarly not subject to § 11347, and no labor protective conditions were imposed.

B. Congress Did Not, In 1976 Legislation, Render § 11341(a) Inapplicable To RLA-Derived Rights.

Respondent ATDA predictably will contend, as it did below, that even if the forerunners of § 11341(a) were once effective to displace RLA-derived rights, Congress nullified the applicability of § 11341(a) to the RLA in 1976—by amending the predecessor to § 11347. Such a contention would lack all merit.

Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, § 402(a), 90 Stat. 31, 62, amended 49 U.S.C. § 5(2)(f) (recodified in 1978 without substantive change as § 11347) to require that a carrier engaging in a transaction approved or exempted by the ICC provide a "fair arrangement" for its employees containing provisions "no less protective of the interests of employees than those heretofore imposed pursuant to [§ 5(2)(f)] and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. § 565) [the Amtrak Act]." 90 Stat. 62. The protection afforded to employees pursuant to the Amtrak Act, in turn, refers to the so-called "Appendix C-1" conditions adopted by the Secretary of Labor in 1971 under that statute. *New York Dock Ry. v. United States*, 609 F.2d 83, 94 (2d Cir. 1979). ATDA has professed to see, in the incorporation of the Appendix C-1 conditions by reference in § 11347, a congressional directive that all existing collective bargaining agreements be preserved—unless employee consent to change is obtained through the RLA § 6 process—when railroads attempt to engage in transactions to which the protective conditions apply. ATDA is wrong.

First, the four concurring Justices in *ICC v. BLE* have already rejected the proposition that the amend-

ment of § 11347 in the 4R Act somehow removed the RLA from the scope of the § 11341(a) exemption. At least one of the union respondents in *ICC v. BLE* made exactly this argument, Brief of Respondent United Transportation Union, *ICC v. BLE*, at pp. 45-50; see 482 U.S. at 295 ("[t]he unions argued that . . . certain provisions of the Interstate Commerce Act" gave employees the right to perform particular work) (Stevens, J., concurring), and the concurring Justices necessarily found it wanting in concluding that § 11341(a) is effective to displace RLA-derived rights. ATDA's contentions are further belied by the decisions of the courts of appeals, since 1976, holding that § 11341(a) immunizes a carrier from all RLA-based claims, as necessary to permit it to carry out the transaction. *Railway Labor Executives' Association v. Guilford Transportation Industries, Inc.*, 843 F.2d 1383 (1st Cir. 1988) (per curiam), *aff'g* 667 F. Supp. 29 (D. Me. 1987), *cert. denied*, 109 S. Ct. 3213 (1989); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d at 801; *Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d at 111-12.

Further, the policy animating the 4R Act precludes the notion of a 1976 nullification of § 11341(a). Congress designed the 4R Act "to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system[.]" S. Rep. No. 499, 94th Cong., 1st Sess. 20 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 34; *see Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Association*, 109 S. Ct. at 2596-97. Forcing a railroad desiring to carry out an approved transaction to abide by all the terms of existing

agreements, or to exhaust the protracted RLA § 6 procedure for changing them, would severely interfere with transactions and thereby retard the very policy Congress was hoping to advance. *See generally FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968) (court "cannot, in the absence of an unmistakable directive, construe [a statute] in a manner which runs counter to the broad goals Congress intended to effectuate").

Moreover, the Appendix C-1 conditions themselves never had the expansive meaning that ATDA would now wrongly read into them. ATDA's contention depends on the language in Article I, § 2 of the Appendix C-1 conditions, directing that rights under collective bargaining agreements be preserved,[41] which ATDA asserts must, by congressional mandate, now be included in any protective conditions the ICC imposes under § 11347. But the terms contained in Art. I, § 2 of Appendix C-1 are of limited and specific scope, and certainly do not erect a barrier to the application of § 11341(a) to the RLA.

The Appendix C-1 requirement applied only to the railroads contracting with Amtrak, *not* to Amtrak it-

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[41] Article I, § 2 of the Appendix C-1 conditions provides:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

This provision now also appears as Article I, § 2 of the *New York Dock* conditions. *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. at 84.

self, *e.g.*, *Baker v. System Federation No. 1*, 331 F. Supp. 1363, 1365-66 (E.D. Pa. 1971), reflecting the particular way in which Amtrak assumed operation of passenger train service. Initially, most of the railroads contracted to provide passenger service for Amtrak using their *own* employees.[42] Article I, § 2 of the Appendix C-1 conditions therefore had the unremarkable effect only of requiring, for example, that the labor agreements of Penn Central Transportation Company continue in effect when *Penn Central* performed services under contract for Amtrak. Later on, when Amtrak began to operate using its own employees, the Appendix C-1 conditions did not require Amtrak to assume the labor agreements that had been in effect on the railroads on which Amtrak employees formerly worked.[43] To the contrary, the Appendix C-

[42] Section 305 of the original Amtrak Act, Pub. L. No. 91-518, 84 Stat. 1327 (1970) contemplated this arrangement. The Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548 (1973) removed this provision, reflecting Congress' intent that Amtrak convert to a scheme in which it would directly operate and control its service. S. Rep. No. 226, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2324, 2325.

[43] At that juncture, Congress amended the Amtrak Act to reaffirm this point:

> Upon commencement of operations in the basic system, the [employee protection] requirements . . . shall apply to [Amtrak] . . . except that nothing in this subsection shall be construed to impose upon [Amtrak] any obligation of a railroad with respect to any right, privilege, or benefit earned by any employee as a result of prior service performed for such railroad.

Pub. L. No. 92-316, § 7, 86 Stat. 227, 230 (1972) (codified at 45 U.S.C. § 565). The accompanying Senate Report explained that the amendment was "designed to remove the fear . . . that Amtrak would have to assume all the obligations incurred by the railroads for those railroad employees who are later employed by Amtrak." S. Rep. No. 756, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2393, 2399.

1 conditions were predicated on the understanding that employees moving to Amtrak would *not* take their former labor agreements with them. The protection available for these employees was *compensation*, not a guarantee of "frozen" job conditions.[44]

ATDA would transform this circumscribed provision into a blanket preservation of existing labor agreements and RLA negotiating rights in connection with ICC-approved consolidations that present circumstances bearing no resemblance to those in which Article I, § 2 of the Appendix C-1 conditions itself applied. In effect, ATDA contends that in a statutory amendment expressly adopting language of continuity, not change, Congress reversed its long established course and en-

[44] Certainly the labor unions have never treated the language of Art. I, § 2 of the Appendix C-1 conditions as conferring the extraordinary rights that ATDA now purports to find there. The unions unsuccessfully *challenged* the Appendix C-1 conditions, claiming that they failed to meet the requirement of § 405 of the Amtrak Act that employees be afforded benefits not "less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act," because the C-1 conditions established a procedure for the negotiation or, failing that, arbitration of implementing agreements that did *not* require that consummation of the transaction be deferred until an agreement had been reached. *Congress of Railway Unions v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971). In challenging the conditions, the unions did not suggest that employees already possessed, by virtue of the RLA, the far more potent right to require that, prior to consummation, railroads negotiate an agreement with the unions governing the terms of a transaction's implementation in accordance with RLA § 6.

acted, *sub silentio*,[45] the Harrington amendment and the unique restrictions that previously had been found only in the temporary ERTA Title I. That reading of the 4R Act has never been adopted by any court, or the ICC, and it is incorrect.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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[45] The provision of the 4R Act amending § 5(2)(f) was a "last minute addition to the statute" without specific legislative history. *New York Dock Ry. v. United States*, 609 F.2d at 93. Congress' "silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds v. Campagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979).

Nos. 89-1027 and 89-1028

FILED

In the Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

CSX TRANSPORTATION, INC., PETITIONER

v.

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, under 49 U.S.C. 11341(a), a party that has entered into a merger approved by the Interstate Commerce Commission is exempt from the legal obligations imposed by a collective bargaining agreement, to the extent such an exemption is necessary in order to implement the merger.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 880 F.2d 562.[1] The court of appeals' order of September 29, 1989 (Pet. App. 27a-28a), amending its prior opinion, is unreported. The opinion of the Interstate Commerce Commission in No. 89-1027 (Pet. App. 29a-46a) is unreported; the Commission's opinion in

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[1] References to "Pet. App." are to the appendix to the petition in No. 89-1027.

No. 89-1028 (89-1028 Pet. App. 33a-52a) is reported at 4 I.C.C.2d 641.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1989. Petitions for rehearing in both cases were denied on September 29, 1989 (Pet. App. 49a-50a). The petitions for a writ of certiorari in both cases were filed on December 28, 1989, and were granted on March 26, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).[2]

STATUTORY PROVISION INVOLVED

49 U.S.C. 11341(a) provides in pertinent part:

> **Scope of authority**
>
> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *.

[2] Under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, this Court is authorized to review, on a writ of certiorari as provided by 28 U.S.C. 1254(1), "a final judgment of the court of appeals." 28 U.S.C. 2350. Although the court of appeals remanded this case to the Commission for further proceedings, we believe its decision is nonetheless "final" for purposes of Section 2350, and is therefore reviewable by this Court. We have explained our views on this point at greater length in our opening brief (at 29-30) and reply brief (at 13 & n.10) in *Sullivan* v. *Finkelstein*, No. 89-504, copies of which have been furnished to all counsel.

STATEMENT

The Interstate Commerce Commission has broad authority to examine, condition, and approve proposed rail carrier consolidations. In the two cases presented, the Commission approved the merger of rail systems and, as a condition of its approval, imposed certain labor protective requirements, intended to soften the impact of the merger on affected employees. Some years later, the merged carriers sought to carry out the approved consolidation by integrating into a single facility services then being performed at separate outlets. Because the proposed integration entailed adverse impacts for employees, however, the respondent unions invoked their rights under existing collective bargaining agreements and requested negotiations under the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*

Reviewing the decision of arbitration committees, the Commission sustained the proposed integrations—thereby precluding enforcement of the conflicting terms of the collective bargaining agreements. The agency relied, in part, on Section 11341(a) of the Interstate Commerce Act, under which parties to an ICC-approved consolidation are exempt "from all other law, including State and municipal law, as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). The court of appeals reversed the Commission's decision, holding that Section 11341(a) applies only to "positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a. Accordingly, the court ruled, Section 11341(a) does not exempt carriers from their legal obligations under collective

bargaining agreements—including those obligations that may jeopardize implementation of an ICC-approved consolidation.

A. Statutory Framework

Chapter 113 of the Interstate Commerce Act (ICA, or Act), 49 U.S.C. 11031 *et seq.*, vests the Interstate Commerce Commission with exclusive and plenary jurisdiction to examine, condition, and approve rail carrier combinations, including the consolidation of two or more carriers. 49 U.S.C. 11343(a)(1). The statutory provisions grant the Commission broad authority to evaluate the effects of these transactions on interested persons and the public. See 49 U.S.C. 11341-11351 (1982 & Supp. V 1987).

Section 11344(c) provides that upon application of the parties, the Commission may conduct a proceeding and "shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). That Section identifies specific criteria to guide the Commission's consideration, including "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. 11344(b)(1)(D).[3]

[3] Section 11344(b)(1) instructs that in situations, as here, involving the merger or control of at least two class I railroads, the Commission shall consider "at least" the following factors (49 U.S.C. 11344(b)(1)):

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

Section 11344(c) also provides that the Commission "may impose conditions governing the transaction." 49 U.S.C. 11344(c).

Section 11347 provides that the Commission shall impose conditions to protect the interests of railroad employees who are adversely affected by an approved transaction. 49 U.S.C. 11347 (1982 & Supp. V 1987).[4] Pursuant to that authority, the Commission has formulated standard labor-protective conditions, derived from the Commission's decision in *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal,* 360 I.C.C. 60, 84-90, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). The *New York Dock* conditions establish, among other things, procedures to resolve—by negotiation and, failing that, binding arbitration—any labor dispute arising from an ICC-approved railroad consolidation. Accordingly, Section 4 of the *New York Dock* conditions, 360 I.C.C. at 85, requires a "railroad contemplating a transaction which . . . may cause the dismissal or displacement of any employees, or rearrangement of forces [to] give at least ninety . . . days written notice . . ." Pet. App. 3a. Section 2, 360 I.C.C. at 84, provides that "[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

[4] Among other things, Section 11347 states that "[t]he arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period)." 49 U.S.C. 11347 (1982 & Supp. V 1987).

and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements." Pet. App. 3a-4a. These conditions ensure that transactions found to be in the public interest can be consummated without labor strife by providing a "fair arrangement" (49 U.S.C. 11347 (Supp. V 1987)) for displaced employees.[5]

When the Commission has approved a transaction, the statute exempts the participants from legal obstacles that would otherwise bar or impede its implementation. Section 11341(a), the so-called immunity provision, provides that upon ICC approval of a Section 11343 transaction:

> A carrier * * * participating in that approved * * * transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction * * *.

[5] The conditions devised by the Commission under Section 11347 for approved transactions stand in sharp contrast to the RLA's cumbersome procedures for changing the provisions of a collective agreement. Under the RLA, an attempt to change a collective agreement results in a "major dispute." *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946). The parties must engage in a protracted procedure to resolve their differences, which includes negotiation, mediation, and conciliation, and must consider voluntary arbitration. See 45 U.S.C. 156, 157. If the parties are unable to reach an agreement, either party may resort to economic self-help such as a lock-out or strike. See generally *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378-380 (1969).

B. Proceedings Below

1. ***No. 89-1027***

a. In March 1982, the ICC approved the application of NWS Enterprises, Inc. (now Norfolk Southern, or NS), a holding company, to acquire control of two rail carriers, petitioners Norfolk and Western Railway Company (N & W) and Southern Railway Company (Southern). See *Norfolk Southern Corp.—Control—Norfolk & W. Ry. and Southern Ry.*, Finance No. 29430 (Sub-No. 1), 366 I.C.C. 173 (1982). In its order approving control, the ICC imposed the standard *New York Dock* labor-protective conditions. Pet. App. 6a. Although the Commission recognized that it was "possible that further displacement [of employees] may arise as additional coordinations occur," it concluded that "the minimum statutory protection of *New York Dock* is appropriate for the protection of applicants' employees affected by this proceeding." 366 I.C.C. at 230-231.

Respondent American Train Dispatchers' Association (the Association) was the bargaining representative of certain N & W employees responsible for "power distribution"—the process by which locomotives are assigned to particular trains and facilities. On September 12, 1986, petitioners informed the Association that they intended to consolidate all power distribution for the combined Norfolk Southern operation by transfering the work performed at the N & W power distribution center in Roanoke, Virginia, to the Southern center in Atlanta, Georgia.[6] The carriers proposed that affected N & W

[6] Petitioners asserted that as a result of the proposed consolidation, "power distribution functions would be aligned along * * * [a] more efficient east-west division of the combined system," thus permitting "substantial cost savings because fewer locomotives will be needed and

employees would be "given consideration" for employment in new positions as superintendents in Atlanta. Superintendents in Atlanta were considered management, however, and were therefore not covered by any collective bargaining agreement. Pet. App. 6a-7a, 30a-31a.

The Association thereafter sought to negotiate the terms under which the proposed transfer would be implemented. The negotiations foundered, however, over the Association's contentions that (1) the carriers' proposal involved a change in an existing collective agreement and was subject to mandatory bargaining under the RLA; (2) the carriers were required to preserve the right of the transferred employees to representation under the RLA; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the collective bargaining agreement with N & W. The carriers then asked the National Mediation Board to appoint an arbitrator pursuant to Section 4 of the *New York Dock* conditions. Pet. App. 7a.

The dispute thereafter came before a three-member arbitration committee, which ruled in favor of the carriers on each of the disputed issues. See J.A. 8-32. The committee first found that the proposed consolidation was part of the control transaction approved by the ICC. J.A. 15-16. It noted that when the Commission approved the underlying merger, the agency had expressly anticipated the possibility of "additional coordinations" that would further "the goal of greater efficiencies" J.A. 15. The committee concluded that the proposed transfer of work to Atlanta met that criterion. J.A. 15-16.[7] Relying on prior

the remaining locomotives can be used more efficiently." Pet. App. 31a-32a.

[7] In particular, the committee observed that during the hearing it had received testimony indicating "that there will be substantial saving

ICC decisions (J.A. 17-19), the committee also held that it had the authority to override—to bar enforcement of—any provision of a collective bargaining agreement or of the Railway Labor Act that impeded implementation of the ICC-approved merger between N & W and Southern. Finally, the committee concluded that the transferred employees could not retain their rights under the collective bargaining agreement. Pet. App. 7a.

The carriers thereafter effected the coordination of work and offered superintendent positions to all nine active and three furloughed N & W employees. Nine of the twelve accepted, two declined, and one retired. There were no displacements of other employees. Pet. App. 33a.

b. The Commission affirmed by a divided vote. Pet. App. 29a-46a. It explained that "[i]t has long been the Commission's view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 [of the *New York Dock* conditions] when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission." *Id.* at 33a. Accordingly, the Commission stated, "the panel correctly found * * * that * * * the compulsory, binding arbitration required by Article I, section 4 of *New York Dock,* took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements." *Id.* at 35a.

to the combined carrier through the planned coordination, both in capital costs since fewer locomotives will be needed and also since operating costs of the remaining locomotives may be reduced through their more efficient utilization throughout the entire system." J.A. 16. See also J.A. 10 (testimony of J.R. Martin, Senior Vice President, Transportation Planning, Southern Railway Company).

The ICC also held that, because the proposed transfer was incident to the merger approved by the Commission, it was "immunized from conflicting laws by section 11341(a)." Pet. App. 35a.[8] The Commission explained that "[t]o the extent that existing working conditions and collective bargaining agreements conflict with a transaction which [the ICC] ha[s] approved, those conditions and agreements must give way to the implementation of the transaction." *Id.* at 36a. "Such a result is essential," the ICC noted, "if transactions approved by [the agency] are not to be subjected to the risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions." *Id.* at 34a. Were the law otherwise, the Commission added, there would be "no assurance that the approved transaction will ever be effected." *Ibid.*

Finally, the Commission upheld as appropriate the decision to override the collective bargaining agreement and the RLA provisions. Reviewing the record, the Commission noted that "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers'

[8] The Commission noted that although "[t]he proposed transfer" was "not specifically mentioned in *Norfolk Southern Control*," it was nonetheless "one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that [the Commission] approved. Indeed, the arbitration panel found that coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction." Pet. App. 35a.

underlying purpose of integrating the power distribution function." [9] Pet. App. 37a.[10]

2. *No. 89-1028*

a. On September 23, 1980, the ICC approved a proposal under which CSX Corporation would acquire control of two other holding companies: (1) the Chessie System, Inc., whose principal railroad subsidiaries were the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railroad Company; and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Line Railroad (later to become petitioner, CSX Transportation, Inc.). See *CSX Corp. – Control – Chessie Sys., Inc., & Seaboard Coast Line Indust., Inc.*, Finance No. 28905 (Sub-No. 1), 363 I.C.C. 521 (1980). As required by Section 11347 of the Act, the Commission imposed a standard set of labor protective conditions, derived from *New York Dock*. Pet. App. 3a-4a; 89-1028 Pet. App. 54a. The Commission recognized that "as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." 363 I.C.C. at 589. Nevertheless, refusing to accede to the unions' request for more favorable protections, the Commission determined that "the standard conditions will adequately protect those employees now identified as affected by the

[9] In denying the Association's earlier application to stay the Committee's arbitration award, the Commission had also noted that "the record shows that N & W and Southern will realize a $26 million capital investment saving and an annual $2 million operating expense saving, exclusive of labor cost savings, from the coordination." J.A. 37.

[10] Commissioner Lamboley dissented. Pet. App. 42a-46a. In his view, the case should have been remanded to the arbitration panel for a determination of whether, and to what extent, the provisions of the collective bargaining agreement could have been accommodated, consistent with the goal of completing the approved transfer.

consolidation as well as those who may be affected in the future, but are not now identified specifically." *Ibid.*

At the time of the consolidation, Chessie operated a heavy freight car repair shop in Raceland, Kentucky, and Seaboard operated a similar shop in Waycross, Georgia. On August 29, 1986, CSX, invoking Section 4 of the *New York Dock* conditions, notified the respondent labor organizations that it intended to close the Waycross shop and to transfer the employees and the work from that shop to the Raceland shop. The transfer was to result in a net decrease in available jobs at the two shops. Pet. App. 4a; 89-1028 Pet. App. 55a.

Relations between CSX and the unions representing its employees were governed at the time by a collective bargaining agreement known as the "Orange Book," negotiated to implement a previously authorized merger. See 89-1028 Pet. App. 54a-55a. The Orange Book provided, among other things, that the carrier would employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." Pet. App. 4a. In return for that job protection, the Orange Book gave the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated [*i.e.*, Seaboard] system * * *." *Ibid.*

Once notified of the proposed transfer of work and employees, respondent Brotherhood of Railway Carmen (the Brotherhood) attempted to negotiate an implementation agreement on behalf of the affected employees. Negotiations foundered, however, due to disagreements about (1) whether the displaced Waycross employees would retain their Orange Book rights; and (2) whether the

proposed transfer would result in a change of working conditions and, if so, whether CSX would be required to comply with the Railway Labor Act before effecting such a change. CSX invoked arbitration under the *New York Dock* conditions, and the matter came before a three-member arbitration panel. Pet. App. 4a-5a.

The arbitration panel concluded that the Orange Book prohibited the proposed transfer of work and employees. 89-1028 Pet. App. 82a-83a. The panel stated, however, that as a "quasi-judicial extension of the ICC" (*id.* at 80a), it had the authority to override any Orange Book or RLA provision that impeded the transfer decision. The panel then held that (1) it would override the Orange Book prohibition on the transfer of work, but not on the transfer of employees, and (2) it would exempt CSX from the RLA insofar as the statute might require the carrier to bargain before unilaterally changing the Orange Book with respect to the transfer. Pet. App. 5a-6a.[11]

b. By a divided vote, the Commission affirmed in part and reversed in part. 89-1028 Pet. App. 33a-52a. The Commission agreed that the arbitrators were "empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement." *Id.* at 43a. But it rejected the panel's refusal to permit the transfer of employees to Raceland. The Commission reasoned that if, as the panel had found, the Orange Book prohibits such a transfer of employees, then to enforce the Orange Book in this setting

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[11] The arbitrators also found that although the proposed consolidation of freight car repair facilities "was not expressly and specifically presented to the Commission during administrative proceedings culminating in approval of the control application," the transaction was nevertheless an "action taken pursuant to authorizations of th[e] Commission," within the meaning of *New York Dock*. 89-1028 Pet. App. 78a.

would "serve[ ] as an impediment to implementation of a transaction authorized by the Commission." *Id.* at 44a. The Commission also found that, in light of the positions available at Raceland and the number of Waycross employees eligible for those positions, "[i]mposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." *Id.* at 45a.[12] The Commission accordingly reversed the arbitrators' decision "to the extent it holds that CSX may not require transfer of [Seaboard] employees as well as work from Waycross to Raceland." *Id.* at 44a.[13]

3. *The Court of Appeals' Decision*

The court of appeals considered the two cases together and reversed and remanded. Pet. App. 1a-26a. The court held that Section 11341(a) of the Act does not authorize the Commission to relieve a party to a Section 11343 transaction of contractual obligations that impede implementation of the transaction.[14] The court explained that the

[12] In particular, the Commission noted that CSX "propose[d] to establish a total of 107 positions at Raceland, including 86 carmen positions. Of the 86 Waycross carmen who are eligible for those positions, 57 are entitled to Orange Book protection." If the arbitrators' decision prevailed, the Commission observed, "those 57 Waycross employees (over 55 percent of the proposed Raceland work force) [could] refuse to accept positions at Raceland." 89-1028 Pet. App. 44a-45a.

[13] Commissioner Lamboley dissented. 89-1028 Pet. App. 46a-52a. He expressed "substantial doubt" that the proposed transfer of work and employees was a transaction authorized by the Commission's prior approval of the control by CSX of Chessie and Seaboard. *Id.* at 46a. He also rejected the proposition that "*any* conflict, regardless of origin or degree, is an impediment pre-empted by [Interstate Commerce Act] provisions." *Id.* at 49a.

[14] The court of appeals acknowledged that the rule of deference articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Coun-*

statute does not expressly state that the ICC may override contracts, "nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to 'contracts,' much less any specific reference to [collective bargaining agreements]." Pet. App. 12a. The court stated that the Commission's contrary view found "no support in the language of the statute," explaining that the phrase "all other law" in Section 11341(a) cannot be read to include "all legal obstacles." Pet. App. 12a.

The court also found no evidence in the legislative history to support the Commission's construction of Section 11341(a). Pet. App. 13a-19a. Looking solely to the Transportation Act of 1920, ch. 91, § 407, 41 Stat. 482, the court stated that Congress had "focused nearly exclusively * * * on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a. The court also discerned in the legislative history "a healthy respect for privately negotiated contracts." *Ibid.* "And never, on the several occasions when Congress has revisited the immunity provision, has it either broadened that provision so as to reach 'all legal obstacles' to an ICC-approved transaction, or acted more specifically to bring 'contracts' or 'collective bargaining agreements' within the reach of the statute." *Id.* at 18a-19a.

The court next "decline[d] to address the question" (Pet. App. 19a) whether Section 11341(a) may operate to override provisions of the RLA. Observing that the Commission's present position with respect to the RLA "depart[s]

cil, Inc., 467 U.S. 837 (1984), "applies to the ICC's reading of the statute that it is charged with implementing." Pet. App. 11a. The court stated, however, that deference may be afforded only where a court determines, "based upon the language of the statute and the 'traditional tools of statutory construction,' * * * that Congress has not 'directly spoken to the precise question at issue.' " *Ibid.*

from its earlier precedent" (Pet. App. 23a), the court directed the agency on remand either to "provide an explanation for its new position on that issue, or adhere to its prior position." *Id.* at 25a. The court also explained that, "[i]n light of [its] holding that § 11341(a) does not empower the ICC to override a [collective bargaining agreement], it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA." *Id.* at 23a. Because of the "uncertainty as to the effects of [the] ruling on the continued vitality of the disputes," the court decided to remand the RLA issue to the Commission "to determine whether there is any live RLA issue remaining." *Id.* at 25a.

Finally, the court "decline[d] to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion * * * that § 4 of the *New York Dock* conditions gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, ~~and to~~ override any contrary provisions of a [collective bargaining agreement]." Pet. App. 25a. In the court's view, the Commission had not raised those claims in its court of appeals' brief. "In any event," the court concluded (*id.* at 26a), it is "best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of" this Court's intervening decision in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989).

4. Petitioners filed petitions for rehearing in the court of appeals. The Commission also filed a "limited" petition for rehearing. In it, the agency advised the court of its "intention to reopen these proceedings and to promptly issue a comprehensive decision on remand addressing issues [the agency] believe[s] the court directed [it] to reconsider and those left open for resolution in further proceedings." The

Commission accordingly "requested that the court refrain from ruling on [the agency's] petition for rehearing until [the agency has] issued [its] decision on remand." *CSX Corp.—Control—Chessie Sys., Inc. & Seaboard Coast Line Indus., Inc.*, ICC Finance No. 28905 (Sub-No. 22) (Aug. 31, 1989) [hereafter, ICC Finance No. 28905].

By order served September 20, 1989, the Commission "reopen[ed] the[ ] proceedings so that [it] could address and explain in detail [its] views on the issue specifically remanded; *i.e.*, whether the provisions of 49 U.S.C. 11341(a) operate to override the provisions of the Railway Labor Act (RLA), as well as on the general issues raised in these proceedings, particularly the impact of our approval of a transaction under 49 U.S.C. 11343 *et seq.* and imposition of our standard labor conditions upon the parties' rights and remedies under the RLA and with respect to existing collective bargaining agreements." ICC Finance No. 28905. The Commission added that "[i]n light of the importance of the legal issues involved and [its] intention to conduct a comprehensive examination of [its] authority under 49 U.S.C. 11341, 11343, and 11347, etc., and the labor conditions [it] ha[s] customarily imposed in approving railroad consolidations," the agency was therefore "seeking further comment by the parties to these proceedings as well as any other interested parties." *Ibid.*

On September 29, 1989, the court of appeals denied petitioners' petitions for rehearing (Pet. App. 50a) and issued an order stating that the Commission's petition would be "deferred pending release of the ICC's decision on remand." Pet. App. 53a-54a. Moreover, the court amended its decision to remand only the "records," thus retaining jurisdiction over the case. Briefs by interested parties have now been filed with the Commission, and the agency entertained oral argument on January 4, 1990.

SUMMARY OF ARGUMENT

The Interstate Commerce Act gives the Interstate Commerce Commission broad authority to approve proposed railroad consolidations that the Commission finds, after appropriate proceedings, to be consistent with the public interest. When such a transaction has been approved, the ICA exempts each participating carrier from "all other law, including State and municipal law, as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). Construing Section 11341(a) in the present case, the Commission determined that petitioners could proceed with their proposed transactions, notwithstanding any conflicting obligations under collective bargaining agreements executed with the private respondents.

The court of appeals reversed, holding that the phrase "all other law" in Section 11341(a) refers only to "positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a. It is that ruling, and only that ruling, that is before the Court at this point, since all other questions remain for consideration by the Commission and any later judicial review.

With respect to that ruling—involving the applicability of Section 11341 to legal obligations under a collective bargaining agreement—the text, history, and purpose of Section 11341(a) confirm the broader construction adopted by the Commission. Since the Commission is the agency charged with the enforcement of the ICA, its reasonable interpretation of the statute should have been upheld.

A. The text is dispositive. Section 11341(a) exempts a covered carrier from "all other law * * * as necessary to let that person carry out the transaction." The exemption from "all other law" is easily sufficient to embrace those laws governing the obligations of parties to contracts in

general, and to collective bargaining agreements in particular. Contracts are creatures of law, and they are rendered enforceable through a regime of state and federal common and statute law. Indeed, this Court in *Schwabacher* v. *United States*, 334 U.S. 182 (1948), recognized that the "law" referred to in Section 11341 includes the law under which contractual obligations are enforced.

The contracts involved in this case—collective bargaining agreements in the railroad industry—are enforceable under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, which "[u]nquestionably * * * is a federal law" within the meaning of Section 11341(a) (*Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir.), cert. denied 375 U.S. 819 (1963)). Thus the longstanding and widespread recognition by the lower courts that Section 11341(a) immunizes ICC-approved transactions from the operation of the RLA where necessary to implement the transaction is both correct and dispositive of the question presented here.

B. The legislative history of Section 11341(a), and of the consolidation provisions generally, confirms the meaning of the text. Section 11341(a) derives from a provision contained in the Transportation Act of 1920, which was intended to foster railroad mergers generally, and which therefore broadly exempted carriers from "all other restraints or prohibitions by law." § 407, 41 Stat. 482. What is more, on two occasions—in 1933, and again in 1940—Congress expressly *refused* to narrow the scope of the ICC's consolidation authority by carving out a special exception for obligations arising from labor agreements.

C. The court of appeals' conclusion—according to which collective bargaining agreements are fully enforceable under the RLA, even when they are in conflict with the terms of an ICC-approved consolidation—cannot

be squared with the evident purpose of the consolidation provisions: to foster the merger process while accommodating, to the fullest extent possible, the competing claims of affected employees. If, as the court of appeals supposed, employees may enforce conflicting contractual rights under the RLA, ICC-approved transactions would "be subjected to the risk of non-consummation." Pet. App. 34a. By proposing a change in the existing collective bargaining agreement, the transaction would thereby provoke a "major" dispute under the RLA. See *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2480 (1989). Where such a dispute is involved, the parties must maintain the status quo while engaging in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969). If that process fails to produce an agreement, each side is free to resort to strikes, lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second and Seventh, 155 First, 156, 157, 160; *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 444-445 n.10 (1987). And "[s]ince there is no mechanism * * * for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected." Pet. App. 34a. If applicable, the procedures for modifying collective agreements under the RLA would therefore "threaten to prevent many consolidations." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431.

D. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S.

121, 131 (1985). In light of the text, history, and purpose of Section 11341(a), the Commission's conclusion—that "all other law" includes the law governing the enforcement of collective bargaining agreements—is entitled to deference and should be upheld.

The court of appeals acknowledged those principles (Pet. App. 11a), but declined to defer to the Commission's construction of the statute. Yet even accepting the court's view (as we do not)—that Congress did not directly address the precise question at issue—the court should have asked only whether the Commission's construction of the statute was "a reasonable one." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984). In our view, the Commission's judgment is plainly reasonable, and the court of appeals erred in "substitut[ing] its own construction of a statutory provision for a reasonable interpretation * * * of an agency" (*id.* at 844).

ARGUMENT

UNDER 49 U.S.C. 11341(a), A PARTY THAT HAS ENTERED INTO A MERGER APPROVED BY THE COMMISSION IS EXEMPT FROM ANY LEGAL OBLIGATION IMPOSED BY A COLLECTIVE BARGAINING AGREEMENT, TO THE EXTENT SUCH AN EXEMPTION IS NECESSARY TO IMPLEMENT THE MERGER

The broad ruling of the court of appeals—that the exemptions provided by Section 11341(a) do not apply to those laws governing the enforcement of contractual obligations—raises only one important but limited question for review. If this Court determines, as we believe it should, that this broad ruling was in error, the judgment below should be reversed and the case remanded for consideration of any remaining questions, including those

that are now pending before the Commission and that may be raised in subsequent proceedings for judicial review.[15]

In reaching its conclusion, the court of appeals, in our view, attempted to separate the inseparable—holding that contracts are not included among the laws referred to in Section 11341(a), but at the same time "declin[ing] to address" the question whether Section 11341(a) may operate to override provisions of the RLA. Pet. App. 19a. Contracts derive their effectiveness and enforceability from a regime of state and federal common and statute law, and the collective bargaining agreements at issue here depend for their effectiveness and enforceability on the RLA. Just as this Court held in *Schwabacher* v. *United States*, 334 U.S. 182 (1948), that contractual obligations enforceable under state law are subject to the exemption conferred by Section 11341(a), so the Court should hold in this case that contractual obligations enforceable under the RLA are subject to the same exemption. This result, we submit, is compelled by the text and history of Section 11341(a) and of related provisions.

A. The Text of Section 11341(a) Makes Clear That Participants In An ICC-approved Merger Are Exempt From All Legal Obstacles, Including Obligations Under Collective Bargaining Agreements, That May Jeopardize The Implementation of The Merger

1. As this Court has explained many times, "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be

[15] These questions may include whether the overriding of contractual obligations was "necessary" to the implementation of the transaction within the meaning of Section 11341(a), and whether and to what extent the Commission's decision was authorized by the labor protective conditions associated with Section 11347.

regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Accord *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *Aaron* v. *SEC.*, 446 U.S. 680 (1980); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). The text of the ICA consolidation provisions, and of Section 11341(a) in particular, leaves no doubt that participants in an ICC-approved merger are exempt from obligations under a collective bargaining agreement that may jeopardize the implementation of the merger.

The statutory language is both clear and straightforward. Section 11344(c) provides that "[t]he Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). Section 11341(a) provides (49 U.S.C. 11341(a)):

> A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

As the statutory language indicates, the Commission must determine whether a proposed consolidation is consistent with the public interest. That determination is made on the record, after hearing the views of interested persons. See 49 U.S.C. 11344 (1982 & Supp. V 1987). It is guided by specific statutory criteria (49 U.S.C. 11344(b))—including criteria requiring specific labor protections (49 U.S.C. 11344(b)(1)(D))—and is, of course, subject to judicial review (28 U.S.C. 2342). But once the proposed transaction is approved, Section 11341(a) confers an exemption from "all other law"—an exemption of sufficient breadth

to permit the exempted party to "carry out the transaction," notwithstanding any legal obstacle.

The exemption from "all other law" is easily sufficient to embrace those laws governing the enforceability of contracts in general, and of collective bargaining agreements in particular. Contracts are voluntarily entered into, but depend for their effectiveness and enforcement on a regime of state and federal common and statute law. "The obligation of a contract," this Court has explained, "is the law which binds the parties to perform their agreement." *Hendrickson* v. *Apperson*, 245 U.S. 105, 112 (1917).[16] And the "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form part of it, as fully as if they had been expressly referred to or incorporated in its terms"—a principle which "embraces alike those laws which affect its construction and those which affect its enforcement and discharge." *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 660 (1923).[17]

Those principles apply with special force to collective bargaining agreements. "Federal law * * * create[s] the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties ma[k]e in response to that duty * * *; and federal law sets some outside limits * * * on what their agreement may provide." *Local 24, Int'l Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 296 (1959). And collective bargaining agreements in the

[16] Accord *Louisiana* v. *New Orleans*, 102 U.S. 203, 206 (1880); *Walker* v. *Whitehead*, 83 U.S. (16 Wall.) 314, 318 (1873); *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535, 552 (1867).

[17] Accord *Hendrickson*, 245 U.S. at 112; *Walker*, 83 U.S. (16 Wall.) at 317; *Von Hoffman*, 71 U.S. (4 Wall.) at 550; *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 212, 231 (1827).

railroad industry are uniquely "legal" instruments: their formation, construction, and enforcement are regulated by a detailed statutory framework—the Railway Labor Act.

For example, the Railway Labor Act requires the parties to "make and maintain agreements" (45 U.S.C. 152 First) and to refrain from making changes in existing agreements, except according to the procedures established by the Act (45 U.S.C. 152 Seventh, 156). The Act "extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements." *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 242 (1950). The Act also "sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail." *Ibid.* "[T]he federal statute is the source of the power and authority" of collective bargaining agreements, and "[a] union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it." *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 232 (1956). Accord *California* v. *Taylor*, 353 U.S. 553, 561 (1957).

Thus, the law that renders collective bargaining agreements in the railroad industry binding and enforceable, and that specifies the procedures for changing such agreements, is, in essence, the RLA, an Act that "[u]nquestionably * * * is a federal law" within the meaning of Section 11341(a) (*Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir.), cert. denied, 375 U.S. 819 (1963)). As the First Circuit recently noted, Section 11341(a) "extends to any of the statutory provisions regulating railroads, including the RLA." *Brotherhood of Locomotive Eng'rs* v. *Boston & Maine Corp.*, 788 F.2d 794, 800, cert. denied, 479 U.S. 829 (1986). "[T]o hold otherwise would be to disregard the plain language of [the statute] conferring exclusive and

plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431-432. Accord *Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107, 111-112 (8th Cir. 1986), cert. denied, 482 U.S. 927 (1987); *Bundy* v. *Penn Cent. Co.*, 455 F.2d 277, 279 (6th Cir. 1972); *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), aff'd without reaching the issue, 404 U.S. 37 (1971).[18]

In short, a contractual provision has legal force only by virtue of law—in this case, the RLA. And the RLA, like any other law, is within the scope of Section 11341(a).

2. The court of appeals attempted to read Section 11341(a) more narrowly. "[D]eclin[ing] to address" the question whether Section 11341(a) applies to the RLA (Pet. App. 19a), the court sought to abstract collective agreements from their federal statutory context, and proceeded to exclude contracts generally from the scope of the Section. In the court's view, "all other law" refers only to "positive enactments, not common law rules of liability" (Pet. App. 18a). As a general proposition, that is surely mistaken; "law" is conventionally understood to include

[18] See also *Texas & N. O. R.R.* v. *Brotherhood of R.R. Trainmen*, 307 F.2d 151, 158-162 (5th Cir. 1962) (holding that the predecessor to Section 11341(a) does not preempt the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.*, or a prior collective bargaining agreement, but recognizing that under the predecessor provision the Commission has jurisdiction "to find whether certain of the union [contractual] demands are contrary to the public interest in the effectuation of the transaction" and "thereafter to prevent the enforcement" of those demands), cert. denied, 371 U.S. 952 (1963). Cf. *Burlington Northern, Inc.* v. *American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (labor-protective conditions imposed as part of ICC approval of a consolidation override conflicting provisions of the RLA), cert. denied, 421 U.S. 975 (1975).

common law, as well as statutes. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 79 (1938). Relying on scattered portions of legislative history, however, the court below concluded that Congress had "focused nearly exclusively" on "specific types of laws it intended to eliminate"—all of which were statutes, not common law. Pet. App. 18a. As we have already shown, that inference could not sustain the result reached below, since the "law" in point here *is* a federal statute (the RLA). And as we show below, the court of appeals misread the legislative history. But in any event, as this Court has recently explained, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 420-421 (1988). See also *Regan* v. *Wald*, 468 U.S. 222, 236-237 (1984); *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261, 275 (1968). Like the statute at issue in *Pittston Coal*, Section 11341(a), with its reference to "all other law," "plainly embraces criteria of more general application." 109 S. Ct at 421. Cf. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944) (broad language of predecessor of Section 11341(a) does "not admit of nullification by reference to the varying conditions under which different types of carriers were brought within the statute's operation").

The court of appeals also surmised that to accept the Commission's construction of Section 11341(a) "would lead to most bizarre results." Pet. App. 13a. In particular, the court stated, "[u]nder the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors." *Ibid.* But there is nothing "bizarre" about the Commission's reading of the statute. Indeed, that is precisely the reading this Court gave the

Act in *Schwabacher* v. *United States*, 334 U.S. 182 (1948). In that case, the ICC had approved a merger of two railroad companies, over the objection of certain preferred stockholders of one of the companies. Those stockholders claimed that the terms of the merger deprived them of the full measure of their rights to compensation under the corporate charter—rights that were theirs as owners of the preferred stock and that were recognized under state law. In reaching its determination, the Commission disclaimed jurisdiction to resolve the shareholders' complaint, ruling that after the merger was finally approved the dissenting claimants could file an action in state court to assert their rights as stockholders. This Court rejected the Commission's approach. Relying on the consolidation provisions of the ICA (41 Stat. 482)—including Section 5(11) (Transportation Act of 1940, ch. 722, § 7, 54 Stat. 905, 908-909), the immediate precursor of Section 11341(a) (see p. 35, *infra*)—the Court held that the Commission "was given complete control of the capital structure to result from a merger." 334 U.S. at 195. Accordingly, the Court explained, before approving the merger the Commission was required to consider the claims of the minority shareholders. *Id.* at 197-198. But once the Commission had done so, and had approved the final transaction as "just and reasonable" (*id.* at 194), the dissenting shareholders were not entitled to attack that decision collaterally, regardless of their rights under state law as owners of the shares. *Id.* at 201.[19]

[19] There is, of course, no question that the state law rights of the dissenting shareholders—rights superseded by Section 11341(a)—were contractual in nature, since they arose out of the corporate charter and the terms under which the preferred stock was offered for sale.

In *Texas & N.O. R.R.* v. *Brotherhood of R.R. Trainmen, supra,* the Fifth Circuit, relying on *Schwabacher,* recognized the Commission's jurisdiction to "prevent the enforcement" of union contractual

B. The Legislative History Of Section 11341(a) Confirms That ICC-approved Mergers Are Exempt From All Legal Obstacles, Including Collective Bargaining Agreements, That May Jeopardize The Implementation Of The Merger

The legislative history of Section 11341(a), and of the consolidation provisions generally, confirms the meaning of the text: once approved by the ICC after a plenary public interest proceeding, a merger is immunized from all legal obstacles—including those posed by obligations under collective bargaining agreements—that threaten the implementation of the approved transaction. Indeed, Congress on two occasions—in 1933, and again in 1940—expressly *refused* to narrow the scope of the ICC's consolidation authority by carving out a special exception for obligations arising from labor agreements.

1. *The Transportation Act of 1920*

The language of the present Section 11341(a) finds its origin in the Transportation Act of 1920, ch. 91, 41 Stat. 456. See generally *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 315-321 (1954) (appendix to opinion of the Court). Sections 407 and 408 of the 1920 Act, 41 Stat. 480, 482, amended Section 5 of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 380, specifically to encourage railroad consolidation. See *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. at 315-316. Following a period of governmental ownership during World War I, "many of the railroads were in very weak condition and their continued survival was in jeopardy." *Id.* at 315. The 1920 Act therefore directed the Commission, "as soon as practicable," to "prepare and adopt a plan for the consolidation of the railway properties of the continental

demands found to jeopardize effectuation of an approved transaction. 307 F.2d at 161-162.

United States into a limited number of systems." § 407, 41 Stat. 481 (§ 5(4)). "As a result of the enactment of the Transportation Act of 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy * * * so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." *United States* v. *Lowden*, 308 U.S. 225, 232 (1939).

To facilitate the consolidation process, the 1920 Act added Section 5(8), exempting participants in Commission-approved consolidations from federal and state legal obstacles. 41 Stat. 482. Section 5(8) stated (41 Stat. 482 (emphasis added)):

> The carriers affected by any order made under the foregoing provisions of this section * * * shall be, and they are hereby, relieved from the operation of the "antitrust laws," * * * *and of all other restraints or prohibitions by law*, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

Consistent with the overall purpose to effectuate consolidation, this broad statutory language targeted all legal "restraints or prohibitions" that might otherwise impede the covered carrier from accomplishing "anything authorized" by the Commission pursuant to the consolidation provisions.

2. *The Emergency Railroad Transportation Act of 1933*

In the years following the enactment of the 1920 Act, there was a continuing decline in railway revenues and traffic. L. Lecht, *Experience Under Railway Labor Legislation* 105 (1955). Many railroads went bankrupt, while others borrowed large sums of money from the Reconstruction Finance Corporation to fund continuing operations. S. Rep. No. 87, 73d Cong., 1st Sess. 1 (1933). To meet the resulting interest charges, many railroads deferred maintenance. H.R. Rep. No. 193, 73d Cong., 1st Sess. 9 (1933). Railroad employment dropped from 1,750,000 to 1,000,000. *Ibid.* Responding to the crisis, Congress enacted the Emergency Railroad Transportation Act of 1933 (ERTA), ch. 91, 48 Stat. 211.

Title I of ERTA was temporary legislation—ultimately of three years duration [20]—that was intended to help the railroads become financially stable. See S. Rep. No. 87, *supra*, at 1. It established "emergency powers to be exercised through a railroad coordinator," whose task was "to compel the elimination of unnecessary expenses and the duplication of services and other economy measures" in order "to stabilize the value of railroad securities and make unnecessary a continued drain on Reconstruction Finance Corporation funds." *Id.* at 1-2. The coordinator did not, however, have explicit authority to compel consolidations. See 77 Cong. Rec. 4859 (1933) (Rep. Rayburn) ("The coordinator has nothing whatever to do with consolidations. * * * [T]he question of consolidation * * * is left where it has been since 1920, with the Interstate Commerce Commission and not with any coordinator"). See also *St. Joe Paper Co* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 317 (1954).

Section 10(a) of Title I of ERTA (48 Stat. 215) contained an immunity provision with language that generally paralleled Section 5(8) of the Transportation Act of 1920

[20] Originally enacted for one year, Title I was extended for an additional year by Presidential proclamation, Proclamation No. 2081, 48 Stat. 1740 (1934), and then for a third year, until June 17, 1936, by Congress. S.J. Res. 112, 74th Cong., 1st Sess.; 79 Cong. Rec. 9346 (1935).

(41 Stat. 482), the earliest precursor of Section 11341(a). Significantly, however, in response to concerns raised by labor representatives, Congress added an explicit exception from Section 10(a) for the requirements of the RLA and for duties and obligations under collective bargaining agreements entered into pursuant to that Act. Section 10(a) therefore provided in pertinent part (48 Stat. 215):

> The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or Commission made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws, * * * and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, in so far as may be necesssary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however,* That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.[21]

At the same time, in Title II of ERTA—which, unlike Title I, was *permanent* legislation, see S. Rep. No. 87,

[21] Title I also contained an additional labor protection, ensuring that, allowing for normal attrition, no action taken by the Coordinator could reduce the number of railroad employees below the number in service during May 1933, and providing further that no employee then in service shall "be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title." § 7(b), 48 Stat. 214.

supra, at 1—Congress amended the consolidation provisions of the Interstate Commerce Act, principally to "give the Commission control over holding companies that acquire stocks of railroads, and thereby effect consolidations without approval of the commission." *Ibid.* In Section 202(15) of Title II, Congress reenacted the immunity provision—Section 5(8) of the 1920 Act—adding somewhat broader language in the process. See 48 Stat. 219. Congress did *not*, however, carve out an exception for the Railway Labor Act or for obligations under agreements made pursuant to that statute. Section 202(15) provided in pertinent part (48 Stat. 219):

> The carriers and any corporations affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws * * * and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

The striking difference between Title I of ERTA (temporary legislation, containing an explicit exception for collective bargaining agreements) and Title II of the statute (a precursor of Section 11341(a), containing no exception for collective bargaining agreements) cannot be considered accidental. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[22] Indeed, this Court made that very point in con-

[22] Accord *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). See also *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148-149 (1980); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-20 (1979).

nection with a related provision of ERTA. In *Texas* v. *United States*, 292 U.S. 522 (1934), the ICC had approved a control transaction, over a State's objection that the terms of the transaction would improperly permit the parties to relinquish certain offices within the State. In this Court, the State contended that the transaction violated Section 11 of Title I of ERTA, which withheld from carriers the authority to abandon offices and shops. 48 Stat. 215. The Court rejected that contention. Section 11, the Court explained, was contained in Title I, which dealt only with the " 'emergency powers' * * * of the Federal Coordinator of Transportation and kindred matters." 292 U.S. at 533. As such, the Court added, Section 11 did "not by its terms apply to the provisions of Title II of the Act, in which are found the amendments of § 5 of the Interstate Commerce Act with respect to the approval and authorization by the Interstate Commerce Commission of consolidations, purchases and leases." 292 U.S. at 533. "The insertion of the provision in Title I, * * * and the omission of a similar provision from Title II, indicate an intentional distinction." *Id.* at 534.

So, too, with respect to the exception for collective bargaining agreements: in structuring Titles I and II as it did, Congress "demonstrated that it knew how to provide [for an exception for collective bargaining agreements] when it wished to do so elsewhere in the very 'legislation cited.' " *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981). "Under traditional principles of statutory construction," the difference between the two sections must therefore be seen as intentional. *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981). See *Lawrence County* v. *Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256, 267 (1985); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

3. *The Transportation Act of 1940*

Section 7 of the Transportation Act of 1940, ch. 722, 54 Stat. 905, amended and recodified Section 5 of the ICA but left the provisions relevant here substantially intact. In particular, Section 5(8) of the 1920 Act, as amended, was subsumed within revised Section 5(11) (54 Stat. 908-909), and remained essentially unchanged. Section 5(11) provided in pertinent part (54 Stat. 908-909):

> any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission * * *.

When Congress recodified this language in the present Section 11341(a) of the ICA, it effected no substantive change. Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466; *Trailer Marine Transp. Corp* v. *FMC*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979). See H.R. Rep. No. 1395, 95th Cong., 2d Sess. 158-160 (1978). See also *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 299 n.12 (1987) (Stevens, J., concurring in the judgment).

During the legislative process culminating in the 1940 Act, there was "a widespread awareness in the railroad industry that many of the economies to be gained from consolidations or abandonments could be realized only at the expense of displaced railroad labor." *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142, 147 (1950). Reflecting that concern, Congress enacted, in Section

5(2)(f) of the Act, 54 Stat. 906-907, a labor protective provision for employees affected by ICC-approved consolidations.[23]

Prior to the enactment of Section 5(2)(f), however, Representative Harrington offered an amendment to the provision, designed to protect affected employees against any displacement or other interference with contractual rights:

> *Provided, however*, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees

[23] Section 5(2)(f) provided as follows (54 Stat. 906-907):

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provision of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Transportation Act of 1940, ch. 722, § 7, 54 Stat. 906-907 (§ 5(2)(f)).
The current version of this provision is 49 U.S.C. 11347 (Supp. V 1987). See p. 40, *infra*.

> of the carrier or carriers, or in the impairment of existing employment rights of said employees.

84 Cong. Rec. 9882 (1939). The proposed amendment posed a significant obstacle to the prospects of future consolidations. As this Court observed in *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. at 151, until the Harrington Amendment was offered, "there had been substantial agreement on the need for consolidations, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related."

Not surprisingly, therefore, the Harrington Amendment encountered intense opposition. In a January 29, 1940 letter to the Chairman of the Senate and House Committees on Interstate Commerce, the Interstate Commerce Commission stated:

> As for the [Harrington Amendment], the object of unifications is to save expense, usually by the saving of labor. * * * The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable.

Staff of House Legislative Comm. On Interstate Commerce Commission, 76th Cong., 3d Sess., *Omnibus Transportation Legislation* 67 (House Comm. Print 1940). After a lengthy conference, on April 26, 1940, the conferees agreed on a bill that followed the form of the House

Amendment but did not contain the Harrington Amendment. See H.R. Conf. Rep. No. 2016, 76th Cong., 3d Sess. 16 (1940); 86 Cong. Rec. 5879-5880 (1940). The House voted to recommit the bill with instructions to its conferees to insist on a modified version of the Harrington Amendment. 86 Cong. Rec. 5886 (1940). After further consideration, the conferees then reported out the bill a second time without the Harrington Amendment. That bill became the Transportation Act of 1940.[24]

The defeat of the Harrington Amendment confirms Congress's intent to allow carriers to implement ICC-approved consolidations—notwithstanding the "impairment of existing employment rights of * * * employees"—as long as those employees are compensated and otherwise fairly protected under the Commission's labor protective conditions. Accord *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961). The court of appeals' decision in the present case overlooks the point, construing Section 11341(a) as if the Harrington Amendment had become law and indeed had been rewritten to extend to all contractual obligations. But the amendment was rejected; and "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987). See generally *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 96 (1935).

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[24] The bill was passed by the House on August 12, 1940, 86 Cong. Rec. 10,194, and by the Senate on September 9, 1940, 86 Cong. Rec. 11,766. It was signed by the President on September 18, 1940, 86 Cong. Rec. 12,290.

C. The Court of Appeals' Decision Cannot Be Squared With The Purpose Of The ICA Consolidation Provisions

The scope of Section 11341(a) must also be "measured by the purpose which Congress had in view"—in this case, "the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure" (*Texas* v. *United States*, 292 U.S. 522, 534-535 (1934)). The court of appeals' conclusion—according to which collective bargaining agreements are fully enforceable even when they are in conflict with the terms of an ICC-approved consolidation—cannot be squared with that evident purpose.

The consolidation provisions foster the merger process, while at the same time accommodating, to the fullest extent possible, the competing claims of employees and other persons who may be adversely affected by the proposed transaction. The statute accomplishes that goal by providing interested parties—including labor unions—extensive opportunities to participate in the Commission's consolidation review proceedings and to voice their objections during the "public interest" inquiry. Parties may object, in whole or in part, to approval of a transaction, on the ground that such approval will undermine the policies expressed in other federal statutes. The Commission must take account of these objections, in determining whether the merger is "consistent with the public interest." 49 U.S.C. 11344(c). See, *e.g., McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944) (antitrust objections to motor carrier consolidation).

The consolidation provisions are particularly solicitous of employees who may be adversely affected by a transaction. Recognizing that consolidations necessarily "result in wholesale dismissals and extensive transfers, involving expense to transferred employees," as well as "the loss of seniority rights" (*United States* v. *Lowden*, 308 U.S. 225,

233 (1939)), the statute imposes a variety of labor protective requirements. Before it may give its approval, the Commission must consider "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. 11344(b)(1)(D). Moreover, as part of any approved transaction, the Commission must impose certain "employee protective arrangements," including a guarantee generally ensuring that "the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission." 49 U.S.C. 11347 (Supp V 1987). And pursuant to Section 11347, the Commission has traditionally imposed the so-called *New York Dock* conditions, which generally entitle an affected employee to receive, for a period of years, the equivalent of the wages he received prior to displacement. See *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, 84-90, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

In this manner, the consolidation provisions ensure that all affected parties have a voice in the approval process, and are accommodated as fully as possible in the approved transaction. At the same time, Section 11341(a) ensures that once the approval has been granted, an exemption from "all other law" takes immediate effect. The statute does not permit employees, who have already received the protections afforded by Section 11347, to impede implementation of the merger by insisting on conflicting collective bargaining rights under the RLA.

Were resort to the RLA necessary, approved transactions would "be subjected to the risk of non-consummation" (Pet. App. 34a). By proposing a change in the existing collective bargaining agreement, the transaction would thereby provoke a "major" dispute under the

RLA. See *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2480 (1989); *Elgin, J. & E. Ry* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946). In any such dispute, the parties must maintain the status quo while engaging in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969). If that process fails to produce an agreement, each side is free to resort to strikes, lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second and Seventh, 155 First, 156, 157, 160; *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 444-445 n.10 (1987); *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

Although that "virtually endless" process may well be suited to prevent the kind of "labor unrest" that gave rise to the RLA (*Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. at 444), it poses severe difficulties for approved consolidations. "[U]nder the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431. As the Commission has noted, "[s]ince there is no mechanism * * * for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected." Pet. App. 34a. If applicable, the RLA would therefore "threaten to prevent many consolidations." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431. Such an outcome cannot be squared with the evident purpose of the consolidation provisions, and Section 11341(a) in particular: to provide an exemp-

tion "as necessary to let [the participant] carry out the transaction" (49 U.S.C. 11341(a)).

D. The Court Of Appeals Erroneously Declined To Defer To The Commission's Construction Of Section 11341(a)

This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). In light of the text, history, and purpose of Section 11341(a), the Commission's conclusion—that the Section applies to legal obligations under collective bargaining agreements—is entitled to deference and should be upheld.

The court of appeals acknowledged those principles (Pet. App. 11a), but declined to defer to the Commission's construction of the statute. The court observed that deference is appropriate only when a court determines, "based upon the language of the statute and the 'traditional tools of statutory construction,' * * * that Congress has not 'directly spoken to the precise question at issue' " (*ibid.*). The court therefore elected to "strike out * * * in search of Congress's intent in enacting the immunity provision of the Act." *Id.* at 11a-12a.

The results of the court's "search" did not justify the panel's refusal to defer to the Commission. After canvassing the text and history of the statute, all the court could determine—on its view of the case—was (1) that Section 11341(a) does not *expressly* refer to "contracts" (Pet. App. 12a); (2) that Section 11341(a) was intended *principally* to

protect against "unfriendly state commissions and legislatures" (Pet. App. 15a) and "recently invigorated antitrust laws of the federal Government" (*id.* at 16a); (3) that in enacting Section 11341(a) Congress had "focused nearly exclusively" on "positive enactments, not common law rules of liability" (Pet. App. 18a); and (4) that in the legislative debates on the 1920 Act, Congress had "exhibited a healthy respect for privately negotiated contracts" (*ibid.*).

Even under the court of appeals' view (which we vigorously dispute), that evidence does not justify a refusal to defer to the Commission. Assuming that Congress did not directly address the precise question at issue, the question before the court was whether the Commission's construction of the statute "in the context of this particular program is a reasonable one." *Chevron U.S.A. Inc.*, 467 U.S. at 843-845. Here, the Commission's judgment is plainly reasonable. Thus, even were the case a close one on the merits—and we do not think it is—the court of appeals erred in "substitut[ing] its own construction of a statutory provision for a reasonable interpretation * * * of an agency" (*Chevron U.S.A. Inc.* 467 U.S. at 844).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1990

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* The Solicitor General is disqualified in this case.

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Nos. 89-1027 and 89-1028

In the Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
PETITIONERS

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

CSX TRANSPORTATION, INC., PETITIONER

v.

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE FOR THE FEDERAL RESPONDENTS TO THE MOTION BY THE UNION RESPONDENTS TO DISMISS THE PETITIONS

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No. 89-1027

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE FOR THE FEDERAL RESPONDENTS TO THE MOTION BY THE UNION RESPONDENTS TO DISMISS THE PETITIONS

In their motion filed May 25, 1990, respondents American Train Dispatchers' Association and Brotherhood of Railway Carmen (the union respondents) ask this Court to dismiss the petitions in this case on the ground of mootness or, alternatively, on the ground that the petitions no longer present

an important question of federal law warranting resolution by this Court.

The union respondents base their motion on a press release issued by the Interstate Commerce Commission on May 17, 1990. In it, the Commission noted that at a May 15 voting conference it had resolved certain issues left open by the court of appeals' decision remanding the present case to the agency. In particular, the press release advised, the Commission had "review[ed] the relationship between the Interstate Commerce Act and the Railway Labor Act in connection with the treatment of employees in mergers and consolidations over the past 50 years." On the basis of that review, the release added, the Commission had determined that "collective bargaining agreements [may] be modified under 49 U.S.C. 11347 and the ICC's employee-protective conditions, but only with respect to the selection of work forces and the assignment of employees—with some qualifications—and only to the extent necessary to permit the carrying out of a merger or consolidation. Employees' contract rights are otherwise to be preserved and their traditional right to bargain over their pay, rules, and working conditions is not to be undermined." The release concluded that "[i]n light of the new approach stated in its decision, the Commission reversed and vacated the two arbitration awards under review in these cases and remanded them for further negotiation by the involved parties and for consideration by arbitrators if necessary in accordance with the decision."

The union respondents contend that, in light of the Commission decision reported in the press release, the present controversy—concerning the question whether 49 U.S.C. 11341(a) applies to legal obligations arising from collective bargaining agreements—is either moot or of no continuing importance. Whatever the merits of that claim—and, at this time, we take no position on that question—it can hardly

be resolved on the basis of a press release. We anticipate, however, that a Commission decision will be issued in the near future. Accordingly, we respectfully suggest that the Court either (1) deny the motion to dismiss, with leave for the union respondents to refile (if they desire) when the decision ultimately issues, or (2) hold the motion until the Commission's decision issues, at which time the parties can address the appropriateness of the relief sought by the union respondents.

For the foregoing reasons, it is respectfully submitted that the motion to dismiss the petitions should be denied or, alternatively, held until the issuance of the Commission's decision.

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MAY 1990

* The Solicitor General is disqualified in this case.

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No. 89-1027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' RESPONSE TO MOTION TO DISMISS

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On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITIONERS' RESPONSE TO MOTION TO DISMISS

Relying on a press release advertising a decision of the Interstate Commerce Commission ("ICC") that has not yet been issued or served, and the terms of which have not been made public, respondent American Train Dispatchers Association ("ATDA") asserts that the writ of certiorari should be dismissed because this case is now moot. Nothing could be farther from the truth.

This case is not moot. Mootness occurs when a case no longer presents a live controversy between parties with a legally cognizable interest in the outcome. Even assuming *arguendo* that the press release accurately

forecasts the ICC's eventual decision, all that the press release shows is that the ICC, on remand, has changed course and resolved some aspects of the matter before it adversely to petitioners Norfolk and Western Railway Company ("NW") and Southern Railway Company ("Southern"). Far from rendering the case in this Court moot, the action of the ICC as advertised instead serves to accentuate the immediate harmful effects on NW's and Southern's interests of the Court of Appeals' erroneous construction of the exemption "from all other law" contained in 49 U.S.C. § 11341(a), and the need for this Court to reverse the Court of Appeals' decision.

STATEMENT

This case seeks review of the Court of Appeals' reversal of a decision of the ICC affirming an arbitration award rendered under Article I, § 4 of the ICC's *New York Dock*[1] labor protective conditions.

The arbitration award imposed an "implementing agreement," in terms proposed by petitioners, that governed the transfer of certain work from an NW facility in Roanoke, Virginia to a Southern facility in Atlanta, Georgia. On appeal, the ICC affirmed the arbitration award in all respects. On judicial review, the Court of Appeals reversed the ICC's decision, holding that the ICC had erred in finding that § 11341(a) was effective to override provisions in a collective bargaining agreement. The Court of Appeals declined to reach the questions whether § 11341(a) overrides the Railway Labor Act ("RLA") or whether,

[1] *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

by operation of 49 U.S.C. § 11347, the arbitration procedure in the protective conditions precluded the assertion of RLA claims, and the court remanded these issues to the ICC. 89-1027 Pet. App. 25a-26a. This Court granted certiorari to review the interpretation of § 11341(a) underpinning the Court of Appeals' decision.

Meanwhile, the ICC has been conducting its proceeding on remand from the Court of Appeals. The ICC, in general fashion, discussed its proposed decision on remand at open voting conferences, on February 9 and May 15, 1990. On May 17, 1990, the ICC issued a press release which, for the first time, indicated that, instead of again affirming the arbitrator's award, the ICC would vacate that award and send the matter back to the parties for further negotiation and, if need be, arbitration of an appropriate implementing agreement. The terms of the ICC's decision have not been made public.[2] Nevertheless, on the strength of the May 17, 1990 press release, ATDA moves to dismiss the writ of certiorari on the ground of mootness.

ARGUMENT

This proceeding is not moot. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The "burden of demonstrating mootness 'is a

[2] The transcripts of the voting conferences contain no references to the vacating of the arbitrator's award. We must await public issuance of the ICC's decision to see what the ICC's ruling really is.

heavy one,' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (*quoting United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)); *accord Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 569-70 (1984), which ATDA has utterly failed to meet.

ATDA's own remarkable motion amply demonstrates the point. ATDA contends that the case is somehow moot because the ICC, on remand, has assertedly jettisoned § 11341(a) in favor of a " 'new approach,' " founded entirely on § 11347, that "has constrained [the ICC] to reverse and vacate the arbitration award which it had previously affirmed. . . . " Motion at 5. But this result, assuming *arguendo* it is the one the ICC has actually reached, proves not mootness, but precisely the opposite: that the controversy between the parties over the scope of the § 11341(a) exemption remains very much alive.

ATDA ignores that the ICC's handling of the case on remand has necessarily been conducted within the restrictive confines of the erroneous interpretation of § 11341(a) adopted by the Court of Appeals. While initially the ICC fully upheld the arbitration award in reliance, in part, on § 11341(a), it now appears that the ICC may have determined that, absent this legal support, the arbitration award does not warrant affirmance. The ICC's "new approach," if it be that, therefore shows not that the decision of the Court of Appeals is no longer consequential but, rather, that the court's mistaken decision has caused the ICC to adopt an artificially narrow conception of its Interstate Commerce Act powers. This is exactly what we predicted might happen when we petitioned this Court for a writ of certiorari. 89-1027 Pet. 24-25.

In addition, as we have previously observed,[3] the Court of Appeals' misreading of § 11341(a) will adversely affect these petitioners now in matters having nothing to do with ICC review of arbitration awards under the protective conditions and in forums other than the ICC. The ICC's holding on remand cannot define the limits of the reach and operation of the § 11341(a) exemption. The exemption is self-executing; it does not depend on ICC action at all, beyond the initial approval of the transaction to which the exemption attaches. *Schwabacher v. United States*, 334 U.S. 182, 194-95 (1948). The ICC is not charged with sole responsibility for determining whether a railroad may claim the benefit of the exemption. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 300 n.13 (1987) (Stevens, J., concurring) ("*Any tribunal* that is faced with a claim that a party is violating some 'other law' has the responsibility of determining whether an exemption is 'necessary to let that person carry out the transaction. . . . ' " (quoting 49 U.S.C. § 11341; emphasis added)). Moreover, the ICC's proceedings on remand involve only labor agreements governed by the RLA. The ICC's ruling on that issue will have no effect on the broader issue raised by the Court of Appeals' holding that the § 11341(a) exemption does not apply to contracts of any type, even if allowing enforcement of those contracts would interfere with the implementation of an ICC-approved transaction.[4]

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[3] Petitioners' Reply To Briefs In Opposition, at 2 (filed March 8, 1990).

[4] ATDA's current motion is little more than a continuation of the position it unsuccessfully advanced in initially opposing the petition for certiorari. At that time, ATDA contended (Br. In

The pernicious effect of the Court of Appeals' decision appears to have been felt by the ICC. For many years, the ICC has relied on § 11341(a) as a source of authority for its position that labor agreements governed by the RLA must yield to the carrying out of an approved transaction. Applying the erroneous holding of the Court of Appeals, in accordance with the doctrine of "law of the case," the ICC has evidently found its authority to be more restricted than the ICC previously had considered that authority to be.[5] This action (if it in fact has occurred) puts at risk the resolution of the controversy between petitioners and ATDA over the terms of the agreement to govern the transfer of work from the NW facility to the Southern facility that the arbitrator's award imposed and the ICC initially upheld. The decision of the ICC, as advertised in the May 17, 1990 press release, plainly does not make this case moot[6]

Opposition at 11) that the petition was premature because the ICC on remand might "develop a position satisfactory to petitioners and legally acceptable to the court of appeals." We explained that the petition was not premature because, *inter alia*, as indicated in text above, issues as to the proper application of § 11341(a) would remain outstanding whatever the ICC decided on remand. In any case, if the ICC's press release accurately describes the agency's decision on remand, then that decision certainly will not eliminate the need for review by this Court because the decision no longer supports our position that the arbitration award should be affirmed in full.

[5] The ICC argues in this Court that the decision of the Court of Appeals is wrong and should be reversed. Brief For The Federal Respondents Supporting Petitioners (filed May 25, 1990).

[6] Moreover, if the case were moot, which it is not, the remedy would be for this Court to vacate the judgment of the Court of Appeals. The effect of that action would be to deprive the decision of the Court of Appeals of all precedential effect and to

but, to the contrary, emphasizes the need for corrective action by this Court.[7]

CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

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June 1990

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reinstate the ICC decision sustaining in full the arbitration award in this case. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *County of Los Angeles v. Davis*, 440 U.S. 625, 634 & n.6 (1979); *A.L. Mechling Barge Lines v. United States*, 368 U.S. 324, 329-30 (1961).

[7] For all these same reasons, ATDA's alternative request to dismiss the writ of certiorari on the ground that the case no longer is "of any general importance," Motion at 6, is entirely without merit and should be rejected.

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No. 89-1027

In The

Supreme Court of the United States

October Term, 1990

Norfolk and Western Railway Company, *et al.*,
Petitioners,

v.

American Train Dispatchers Association, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITIONERS' SUPPLEMENTAL RESPONSE TO MOTION TO DISMISS

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AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITIONERS' SUPPLEMENTAL RESPONSE TO MOTION TO DISMISS

ARGUMENT

This case was not moot when respondent American Train Dispatchers Association ("ATDA") filed its motion to dismiss the writ of certiorari, and it is not moot now.[1] The lawsuit began when ATDA sought reversal of an Interstate Commerce Commission ("ICC") decision affirming an arbitration award that

[1] ATDA filed its motion to dismiss on May 24, 1990 and petitioners filed a response on June 1, 1990. On June 20, 1990, the Court delayed further consideration of the motion for 120 days. On September 19, 1990, ATDA filed a supplemental memorandum in support of its motion ("Supp. Mem.").

had imposed an implementing agreement, governing the transfer of certain work, upon ATDA and petitioners Norfolk and Western Railway Company ("NW") and Southern Railway Company ("Southern"). In upholding the award, the ICC concluded, *inter alia*, that the exemption "from all other law" contained in 49 U.S.C. § 11341(a) provided authority for the modification of collective bargaining agreements that ATDA alleged had occurred.

In its June 21, 1990 decision on remand from the Court of Appeals, 6 I.C.C.2d 715 (the "Remand Decision"), the ICC, no longer able to rely on this legal support because of the Court of Appeals' erroneous holding that § 11341(a) does not reach collective bargaining agreements, vacated the arbitration award it had earlier affirmed and left the parties to attempt to negotiate a new implementing agreement, 6 I.C.C.2d at 757.[2] The Remand Decision found in 49 U.S.C. § 11347 a source of authority on which an arbitrator formulating an implementing agreement could rely in deciding whether to modify collective bargaining agreements to permit the approved transaction. 6 I.C.C.2d at 752-54. But the ICC also found this § 11347 authority to be circumscribed in ways that would not be applicable under the blanket exemption conferred by § 11341(a) itself. Far from rendering the case moot, the ICC's action on remand jeopardizes the previously arbitrated solution and

[2] The Federal Respondents have previously filed a copy of the Remand Decision with the Court.

NW, Southern, and CSX Transportation, Inc. ("CSXT") (petitioner in No. 89-1028) have petitioned the ICC to reopen and reconsider or clarify the Remand Decision; those petitions remain pending before the ICC.

leaves the controversy between the union and railroad parties very much alive.

Contrary to ATDA's assertions (Supp. Mem. at 4), the proper meaning to be given § 11341(a) obviously has not become "virtually irrelevant" to the resolution of the parties' continuing dispute. According to ATDA, the Remand Decision purportedly has "shifted the focus" away from the reach of § 11341(a) in favor of the scope of the ICC's authority under § 11347. ATDA simply disregards that the approach to this case adopted by the ICC on remand is entirely the product of the ICC's obligation to comply with the Court of Appeals' mandate. The Remand Decision itself leaves no doubt that the ICC's decision to rely on § 11347 as the source of the authority to modify collective bargaining agreements, and not on § 11341(a) as before, was compelled by the law of the case. 6 I.C.C.2d at 722, 745, 750, 756 n.34. And the Remand Decision goes on specifically to observe that the ICC is arguing in this Court that the Court of Appeals' interpretation of § 11341(a), in this respect, is "in error." 6 I.C.C.2d at 756 n.34. Nothing in the Remand Decision suggests that a ruling by this Court that § 11341(a) applies to collective bargaining agreements would be irrelevant to the ICC's determining anew the true extent of its Interstate Commerce Act powers under both § 11347 and § 11341(a).

Indeed, the ICC has made clear that if this Court were to reverse the decision of the Court of Appeals, a result the ICC urges here, the ICC will be required to reexamine the reasoning and approach adopted in the Remand Decision. In its July 20, 1990 decision denying petitioners' request for a stay of the effectiveness of the Remand Decision ("Stay Decision"),

a decision that is nowhere mentioned in ATDA's supplemental memorandum, the ICC reiterates that it is "obliged . . . as a matter of law" to defer to the mandate of the Court of Appeals "unless and until we are successful in having that view declared erroneous by the Supreme Court," Pet. Supp. Resp. App. (No. 89-1028) at 10a.[3] The ICC then goes on to explain that, as compared with the position it adopted in the Remand Decision, "we are asserting more expansive Section 11341(a) authority before the Supreme Court. 6 I.C.C.2d at 756 n. 34. If that Court should rule that the *Carmen* court was in error, we would, of course, consider the appropriate scope of our authority under Section 11341(a)." Pet. Supp. Resp. App. (No. 89-1028) at 10a.[4]

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[3] A copy of the Stay Decision is reproduced in the Appendix to Petitioner's Supplemental Response To Motion To Dismiss, filed by petitioner CSXT in No. 89-1028 in September 1990. Citations in the form "Pet. Supp. Resp. App. (89-1028) at ___ " refer to that Appendix.

[4] The ICC has also made clear that it would have to reconsider any suggestion in the Remand Decision that the reach of § 11341(a) is merely coextensive with the ICC's authority under § 11347, see 6 I.C.C.2d at 754, if this Court were to reverse the Court of Appeals' decision. Thus, in its Stay Decision, the ICC notes that it does "not disagree" with the following statement made by CSXT in its response to the motion to dismiss filed by the union respondent in No. 89-1028:

> If the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles", the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing

In the circumstances, it is evident that the dispute over the proper scope of the § 11341(a) exemption remains live, continuing, and of real consequence; its resolution will affect the rights of the railroad and union parties in this case. ATDA's contentions notwithstanding, the ICC's effort to comply with the mandate of the Court of Appeals neither makes this case moot nor prevents this Court from taking action to correct the Court of Appeals' mistaken decision. *See Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 791 n.1 (1985); *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 136 n.2 (1985) (Marshall, J., dissenting); *Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977).[5]

> from collective bargaining agreements.

Pet. Supp. Resp. App. (No. 89-1028) at 10a n.9.

[5] Indeed, although ATDA now says that the meaning of § 11341(a) is no longer in the case, ATDA took just the opposite position in the Court of Appeals in its August 3, 1990 petition for a special writ requiring the ICC to conform its decision on remand to the decision of the Court of Appeals that is now before this Court. There, ATDA asserted that, notwithstanding the ICC's purported reliance on § 11347 as the source of authority to override agreements, § 11341(a) was necessarily at the heart of the Remand Decision

> because the necessary statutory underpinning to any exercise of Section 11347 authority to override the RLA, must be Section 11341(a) and this court has already addressed the scope of that section's authority with respect to RLA agreements.

Pet. Supp. Resp. App. (89-1028) at 26a.

CONCLUSION

The motion to dismiss should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NORFOLK & WESTERN RAILWAY COMPANY and SOUTHERN RAILWAY COMPANY,
Petitioners,
v.
AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
Respondents.

CSX TRANSPORTATION, INC.,
Petitioner,
v.
BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1027 and 89-1028

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Respondents.

**On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The American Train Dispatchers' Association and the Brotherhood of Railway Carmen [hereinafter, "union respondents"] on May 24, 1990 filed a motion to dismiss the Writs of Certiorari entered in these proceedings on the grounds that the issue as presented in those Writs had been rendered moot by recent actions of the Interstate Commerce Commission [hereinafter, "Commission" or "ICC"] or, alternatively, that they should be dismissed

as no longer presenting an important question of federal law which should be decided by this Court.

The Federal respondents replied to the motion but took no position on the issues of mootness or continuing importance; however, they suggested to the Court that it might "hold the motion until the Commission's decision issues,[1] at which time the parties could address the appropriateness of the relief sought by the union respondents".

On May 25, 1990, the railroad and Federal respondents filed their briefs on the merits. Union respondents' brief was due to be filed on July 20, 1990 but on June 11, 1990, the Court issued the following order:

> Further consideration of the motion of respondents American Train Dispatchers' Association, *et al.* to dismiss is deferred for 120 days. Further briefing in this case is suspended for 120 days.

On June 21, 1990, the Commission issued its written opinion[2] which union respondents consider to be in excess of the limitations placed upon the ICC by the remand order of the Court of Appeals. The union respondents requested the Court of Appeals to require the Commission to conform its decision and order to that court's remand order, which request was denied on September 10, 1990, effectively ending the proceeding in the court below.

A copy of the written decision of the Commission was filed with this Court by the Commission and is reported at 6 I.C.C.2d 715.

The Commission reversed and vacated the arbitration awards, a result the union respondents had sought since

[1] The union respondents' motion was based upon a news release prepared by the ICC describing the contents of its then yet to be released written opinion.

[2] The decision is accompanied by the 19-page dissent of Commissioner Lamboley.

they first instituted these actions, and remanded the proceedings "to the parties to continue the implementing process in accordance with Section 4 of the *New York Dock* conditions through further negotiations or arbitration, if necessary, to reach new implementing agreements in accordance with the standards set forth in this decision". (6 I.C.C. 2d at 757.)

ARGUMENT

The Commission's written decision confirms in every respect the contents of the news release attached to union respondents' motion to dismiss. It holds, for example, that in its decision in the instant proceedings it does not rely "on § 11341(a) for authority to modify CBAs [*i.e.*, collective bargaining agreements], but on § 11347 and our conditions imposed thereunder, an area the *Carmen* court did not reach" (*id* at 750-51); that whatever may be the extent or effect of the authority granted the Commission under Section 11341(a) of the Interstate Commerce Act [49 U.S.C. § 11341(a)], ICC authority "is also defined and limited by the labor protective conditions adopted by the Commission pursuant to § 11347" (*id.* at 720); and, that "whatever the extent of exemptive authority conferred by that provision [§ 11341(a)] with respect to mergers and consolidations, it does not go beyond the limits of our authority under § 11347 and the labor protective conditions." (*Id.* at 751 n.29.)

The Commission goes on to note that indeed, it is employing a new approach, a "return to the pre-1980 approach based upon harmonizing the provisions of these [Interstate Commerce and Railway Labor] Acts" (*id.* at 718) by which it "wish[es] to reestablish the balance between the employee's legitimate right to bargain over the conditions of his employment and the railroads' equally legitimate right to promptly carry out transactions . . . ." (*Id.* at 721.) It acknowledges that for almost forty years a "relatively harmonious working relationship" existed "between management and labor when im-

plementing ICC-approved conditions", but that since 1979, labor, management and the Commission "have been immersed in litigation involving the role of the RLA, the ICA, and the Commission's conditions".[3] (*Id.* at 745.) The Commission then concedes that a major factor contributing to the loss of industry harmony was "our decision in *DRGW* in 1983, followed by *Maine Central* in 1985" which arbitrators interpreted as holding that "§ 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation" and that "the inconsistencies between Section 2 and 4 of the *New York Dock* conditions are to be resolved in favor of Section 4 . . . ." The Commission then confirms the fact that "[u]nder these interpretations, the preservation of contracts under Section 2 is given essentially no effect and any terms of a CBA can be overridden if it [sic] 'impede[s] effectuation' of the merger". (*Id.* at 746.) The Commission then determines that it does "not today endorse the broader implications of the arbitrator's ruling in the *Dispatchers* award nor . . . [does it] assert that any authority conferred by § 11341 may be exercised without regard § 11347 and the labor protective conditions." (*Id.* at 752.)

Union respondents respectfully submit that the Commission has shifted the focus of the dispute in these cases from the scope of the Commission's authority under Section 11341(a) to the scope of its authority under Section 11347, an issue not reached below and not presented by petitioners to this Court. Indeed, viewed against the backdrop of the Commission's decision, the meaning of Section 11341(a) becomes virtually irrelevant for, as the Commission has now concluded, regardless of the "extent or effect of . . . Section 11341(a) . . . , [ICC authority]

[3] The Commission errs regarding the year in which this litigation began. It began in 1983 following the Commission's decision in Finance Docket No. 30,000 (Sub-No. 18), *Denver and Rio Grande Western R. Co. - Trackage Rights - Missouri Pacific R. Co.* (not printed), served October 25, 1983 (*DRGW*).

is also defined and limited by . . . § 11347". (*Id.* at 720, *supra*, p. 3.)

CONCLUSION

While the Commission's published decision may have raised a number of issues regarding the validity of the Commission's current view of its authority, union respondents respectfully submit it confirms that the issue now before this Court on writs of certiorari has been rendered moot or, at the least, has lost any stature as an important question of federal law that this Court should decide and, that the writs now should be dismissed.

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In the Supreme Court of the United States

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NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

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CSX TRANSPORTATION, INC., PETITIONER

v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE FOR THE FEDERAL RESPONDENTS TO THE SUPPLEMENTAL MEMORANDUM OF THE UNION RESPONDENTS IN SUPPORT OF THE MOTION TO DISMISS THE PETITIONS

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE FOR THE FEDERAL RESPONDENTS TO THE SUPPLEMENTAL MEMORANDUM OF THE UNION RESPONDENTS IN SUPPORT OF THE MOTION TO DISMISS THE PETITIONS

In a supplemental memorandum filed September 19, 1990, respondents American Train Dispatchers' Association and Brotherhood of Railway Carmen (the union respondents) renew their contention that the writs of certiorari should be dismissed because the

question presented has become moot or has ceased to be an important federal issue. The union respondents' argument is based on the decision of the Interstate Commerce Commission, issued June 21, 1990, on remand from the court of appeals. *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 6 I.C.C.2d 715.[1]

The union respondents assert that the question before this Court has become "virtually irrelevant" because the Commission's decision on remand "shifted the focus of the dispute in these cases from the scope of the Commission's authority under [49 U.S.C.] 11341(a) to the scope of its authority under [49 U.S.C.] 11347, an issue not reached below and not presented by petitioners to this Court." Supp. Mem. 4. In particular, the union respondents point to the Commission's statement that "whatever the extent of [the Commission's] authority under * * * [§ 11341 (a)], it is also defined and limited by the labor protective conditions adopted by the Commission pursuant to § 11347." 6 I.C.C.2d at 720. See also *id.* at 751 n.29 ("[W]hatever the extent of the exemptive authority conferred by * * * [§ 11341(a)] with respect to CBAs [collective bargaining agreements] in the context of mergers and consolidations, it does not go beyond the limits of our authority under § 11347 and the labor protective conditions.").

[1] The union respondents based their motion to dismiss, filed May 24, 1990, on a press release announcing the Commission's general conclusions. In response, the federal respondents suggested that consideration of the motion be deferred until the Commission published its decision. On June 11, the Court issued an order suspending further consideration of the motion to dismiss, and further briefing, for 120 days. 110 S. Ct. 2615 (1990). The federal respondents lodged copies of the Commission's decision with the Court on June 29.

The union respondents misinterpret the significance of the Commission's decision. As the Commission explained, the focus on Section 11347 was necessary to comply on remand with the mandate of the court of appeals. See *CSX Corp.*, 6 I.C.C.2d at 756 n.34 ("[W]e rely on § 11341 as furnishing authority to replace [Railway Labor Act] procedures, but in accordance with the opinion of the Court of Appeals, we do not rely on § 11341 as a basis for effecting modifications of CBAs."). The Commission expressly noted in its decision on remand that it is "advancing [in this Court] the argument that the Court of Appeals was in error on this point and that § 11341 does furnish a further basis for modification of CBAs to the extent permissible under § 11347 and the labor protective conditions." *Ibid.*[2]

One month later, on July 20, the Commission further explained its position, and removed any possible doubt as to mootness, in a decision denying petitioners' application for a stay of the June 21 decision.[3] In its July 20 decision, the Commission said:

[2] The Commission also noted that "[i]n cases which do not come within the [Washington Job Protection Agreement] or our WJPA-based labor conditions, * * * it may be necessary for us to assert the full measure of our authority under § 11341(a) to avoid frustrating the will of Congress." 6 I.C.C.2d at 756.

In a separate opinion concurring in part and dissenting in part, Commissioner Lamboley reasoned that the authority to displace Railway Labor Act procedures implies authority to conclude an "implementing agreement" that modifies existing CBAs. Commissioner Lamboley concluded that the authority to effect such modifications is to be found, if anywhere, only in Section 11341. See 6 I.C.C.2d at 759, 774.

[3] A copy of the July 20 decision is attached as an appendix to this response.

> [P]etitioners appear to be complaining that we have impermissibly limited the reach of Section 11341(a). As we have stated, to the extent we asserted Section 11341(a) authority at all we concluded that such authority must extend "at least to the extent" of our Section 11347 authority in the June 21 Decision. We also indicated in that decision that we are asserting more expansive Section 11341(a) authority before the Supreme Court. 6 I.C.C.2d at 756 n.34. If that Court should rule that the *Carmen* court was in error, we would, of course, consider the appropriate scope of our authority under Section 11341(a). * * *

App., *infra*, 13a. Moreover, the Commission said it did not disagree with the statement that

> [i]f the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles," the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing from collective bargaining agreements.

App., *infra*, 13a n.9.

In short, the decisions of the Commission demonstrate that there is a "presently existing dispute * * * between the parties to this case" as to the interpretation of Section 11341. *Burke* v. *Barnes*, 479 U.S. 361, 364 (1987). Accordingly, the question before the Court is not moot.

For the foregoing reasons, it is respectfully submitted that the motion to dismiss the petitions should be denied.

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Acting Solicitor General *

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Deputy Associate General Counsel
Interstate Commerce Commission

SEPTEMBER 1990

* The Solicitor General is disqualified in this case.

APPENDIX

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC. AND SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 29430 (Sub-No. 20)

NORFOLK SOUTHERN CORPORATION—CONTROL—NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

DECISION

Decided: July 19, 1990

[Service Date: July 20, 1990]

On July 2, 1990, Norfolk & Western Railway Company and Southern Railway Company (jointly "N&W") filed a petition to stay the effectiveness of the Commission decision served June 21, 1990 in these proceedings and reported at 6 I.C.C.2d 715 (the "June 21 Decision"). In that decision we reversed and vacated two arbitration awards and remanded the proceedings to the parties to continue the negotiation and arbitration procedures established under our labor protective conditions. 6 I.C.C.2d at 722, 757, 775.

N&W seeks a stay "pending completion of judicial and administrative proceedings following the Supreme Court's disposition of *Norfolk & Western v.*

American Train Dispatchers Association, No. 89-1027, consolidated with *CSX Transportation, Inc. v. Brotherhood of Railway Carmen*, No. 89-1028."[1] Alternatively, N&W seeks a stay pending disposition of a petition to reopen and for reconsideration of the June 21 Decision. N&W filed that petition on July 11, 1990. On the same date, N&W filed a petition for stay pending judicial review indicating that it intends to file a petition for review of the June 21 Decision "in a court of appeals." Pet. at 4.

On July 2, 1990, CSX Transportation, Inc. ("CSX") also filed a petition to stay the June 21 Decision. CSX seeks to stay the effectiveness of that decision until the Commission disposes of a petition for reconsideration and clarification. That petition was filed by CSX on July 11, 1990. In addition, CSX filed a petition for stay pending judicial review on July 11, 1990, indicating that it intends to seek review in the United States Court of Appeals for the District of Columbia Circuit.[2] The Brotherhood of

[1] On March 26, 1990, the Supreme Court granted petitions for writs of certiorari in Nos. 89-1027 and 89-1028 to review the decision of the Court of Appeals for the District of Columbia Circuit in *Brotherhood of Railway Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989) (the "*Carmen*" decision). In *Carmen*, the court of appeals reversed our earlier decisions in these proceedings reported at 4 I.C.C.2d 641 and 1080. See discussion in the June 21 Decision, 6 I.C.C.2d at 729-30, 756 n. 34.

[2] We will consider the arguments in the two petitions for stay pending judicial review, although we question whether judicial review is a available at this time since we are only ruling on the petitions for stay. *United Transportation Union v. ICC*, 871 F.2d 1114 (D.C. Cir. 1989) (judicial review of agency decision not available to party that has also filed a petition for reconsideration that remains pending before the agency); *ICG Concerned Workers Association v. United States*, 888 F.2d 1455 (D.C.Cir. 1989) (same).

Railway Carmen and the American Train Dispatchers' Association (jointly "Rail Labor") filed responses to the petitions for stay on July 9 and 16, 1990.

Petitioners have not demonstrated entitlement to a stay by reference to each of the four factors identified in the seminal decision of *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958):

(1) that there is a strong likelihood that the movant will prevail on the merits;[3]

(2) that the movant will suffer irreparable harm in the absence of a stay;

(3) that other interested parties will not be substantially harmed; and

(4) that the public interest supports the granting of the stay.

Analysis of the critical second factor essentially disposes of the stay petitions. Therefore, we first address whether petitioners have demonstrated that in the absence of a stay they will suffer irreparable harm.

I. IRREPARABLE HARM

Although the concept of irreparable harm does not lend itself to exact definition, there are several indisputable principles that guide us in our determination whether this requirement has been met. First, the anticipated injury complained of must not be specu-

[3] In *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), the court of appeals held that in a case in which the other three factors strongly favor interim relief, a stay may be granted if the movant has made a substantial case on the merits.

lative. As stated in *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C.Cir. 1985) (citations omitted; emphasis in originals in decisions quoted):

> [T]he injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time"; the party seeking injunctive relief must show that "[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.

The court of appeals went on to describe the nature of the showing required of a party seeking the extraordinary remedy of a stay pending review (*id.* at 674):

> [T]he [petitioner must] substantiate the claim that irreparable injury is "likely" to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The [petitioner] must provide proof indicating the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the [petitioner] must show that the alleged harm will directly result from the action which the [petitioner] seeks to enjoin.

It is also well settled that economic loss of itself does not constitute irreparable harm. In *Sampson v. Murray*, 415 U.S. 61, 90 (1974), the Supreme Court quoted "the traditional standards of *Virginia Petroleum Jobbers*" on irreparable injury:

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expanded in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

A corollary of this principle is that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v. Bannercraft Co.*, 415 U.S. 1, 24 (1974), citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938). Similarly, "[t]he usual time and effort required to pursue an administrative remedy does not constitute irreparable injury." *Randolph-Shephard Vendors of America v. Weinberger*, 795 F.2d 90, 108 (D.C. Cir. 1986).

Despite these well settled principles, petitioners premise their stay petitions on unsubstantiated and speculative allegations of injury and the expense and inconvenience of pursuing the remedies we have adopted, continued negotiation and, if necessary, arbitration. As the judicial precedents cited above clearly establish, neither of these contentions establish irreparable injury.

In its July 2 stay petition, CSX contends that, absent a stay, Rail Labor "*may* argue that the consolidation has to be undone;" or "*could* assert" that there was no ICC authority for the consolidation, or "*may* threaten a strike" (p. 2, emphasis added). Similarly, N&W aserts in its July 2 petition that "It *may . . . be suggested* that . . . the carriers now have an obligation to restore the *status quo ante*" (p. 9, emphasis added). Rail Labor responded (July 9 Response 8):

> [T]he claims of irreparable injury are based upon a possible strike, or return of the former separate operations to the *status quo ante* the transfers of work, etc. These claims of irreparable injury are wholly speculative and can be nothing more than that until [CSX and N&W] enter into negotiations . . .

We agree that petitioners have failed to demonstrate their feared injury is so real or imminent as to warrant the imposition of a stay delaying resolution of these proceedings.[4]

The likelihood that the transactions would ever have to be undone is diminished by the fact that, as petitioners correctly note, we did not find that the transactions were contrary to the standards that we enunciated in the June 21 Decision. As we stated (6

[4] We certainly could not endorse N&W's suggestion that we wait until the Supreme Court reviews *Carmen* in Nos. 89-1027 and 89-1028 *and* all subsequent administrative and judicial proceedings are completed. We considered the Supreme Court's grant of the writs of certiorari when we issued the June 21 Decision and noted our own participation in the Supreme Court proceedings, 6 I.C.C.2d at 756 n.34. We obviously made a determination at that time that the public interest was better served by issuing the June 21 decision despite the pending Supreme Court review. N&W mentions no subsequent events that should influence us to reverse that determination. In fact, there are indications that resolution by the Supreme Court has become more indefinite. That Court has suspended briefing until October 1990 (Rail Labor Response at 5-6). Even if certain procedural objections to those proceedings are overcome and the Court hears argument on the merits of *Carmen*, the Court may not resolve the dispute. The last time the Supreme Court considered an ICC consolidation case involving labor issues, the Court did not reach the merits, but vacated the court of appeals' decision on procedural grounds. *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987).

I.C.C.2d at 722), we were unable to affirm the arbitrators' implementation of those transactions because the arbitrators "based their decisions on pronouncements that the *Carmen* court found to be incorrect statements of the law and that we modify in this decision . . .". The parties, and any arbitrators selected by the parties, are to be guided by the principles in the June 21 Decision. If, as petitioners contend, the transactions conform to those principles, there should be no need for any undoing of those transactions.[5]

The speculative nature of a potential strike is shown by the fact that there has been no threat, the remand was to the parties to "continue the implementing process *pursuant to Section 4 of the [Commission's] New York Dock conditions*" (6 I.C.C.2d at 722, emphasis added), and Rail Labor has cooperated in abiding by the procedures established under the Commission's labor protective conditions throughout these extended proceedings.[6]

CSX finds irreparable harm in being "forced to engage in additional negotiations and arbitration . . . requir[ing] further expenditures of time and the limited resources of the parties. . ." July 2 Petition

[5] N&W assumes (July 21 Petition 9) that a remand directly to an arbitrator would remove uncertainty as to any undoing. Since, as we will discuss below, the arbitrator in the N&W proceeding has opined that an arbitrator loses jurisdiction to rule on the merits once he renders his award, we believe that assumption is illusory.

[6] Rail Labor states in its July 19 Response (p. 3, emphasis in original):

> *If* at a future date events indicate that the carriers' speculation are about to be proved correct, they will have adequate remedies in the courts at that time, particularly in the court before which they will be appearing on review of the Commission's June 21, 1990 decision.

10-11. N&W also finds ireparable injury in being required to negotiate with Rail Labor or "rearbitrate." July 2 Petition 5. But these are precisely the type of litigation or administrative expenses that the Supreme Court and the D.C. Circuit found did not constitute irreparable harm in the cases cited above. These expenses arise in connection with any decision that may be appealed or further litigated through appeal or remand. Accordingly, petitioners have not demonstrated that they will suffer irreparable injury in the absence of a stay.

II. LIKELIHOOD OF SUCCESSON THE MERITS

Petitioners have not made a strong showing that they are likely to prevail on the merits. While we are not here disposing of the two July 11 petitions seeking reopening, reconsideration, or clarification of the June 21 Decision, we will consider the allegations of error in those petitions to determine whether a substantial case on the merits has been made by petitioners.

CSX (Pet. for Recon. 7-8) and N&W (Pet. for Recon. 4-9) contend that the Commission committed material error when it failed to explain why the arbitration awards that were vacated did not meet the standards established in the June 21 Decision. As we have indicated above and at 6 I.C.C.2d at 722, we vacated the awards, not because we found them wanting under our newly-announced standards, but because the arbitrators in both decisions rested their awards on statements that the *Carmen* court found to be incorrect (see 6 I.C.C.2d at 729-30) and upon which we accordingly did not rely in our decision on remand (see 6 I.C.C.2d at 750-54). We fully articulated the reasons why we could not uphold the arbitrators' rulings.

We could have applied the new standards ourselves to the implementing agreements. We chose not to do so, however, because we believed this would diminish the freedom of the parties to negotiate as well as the role of arbitrators, upon whose expert guidance we intend to place great reliance. See discussion, 6 I.C.C.2d at 721-22, 753 n.31. We stated there that we were relying on the experience of arbitrators, management and labor to properly implement the new policy, balancing the rights and accommodating the needs of labor and management. 6 I.C.C.2d at 721. We did not abuse our discretion by remanding these two transactions for further consideration by the parties most directly involved.[7]

N&W has a related procedural complaint (Pet for Recon. 18-20) about our remand "to the parties" (with arbitration, if necessary, 6 I.C.C.2d at 757) rather than directly to an arbitrator. According to N&W, "potential uncertainty" would be removed by remanding to the arbitrator responsible for the N&W implementing agreement, Referee Harris (Pet. at 19). In light of Referee Harris' recent statements in Finance Docket No. 30965, *Delaware and Hudson Railway Co.,—Lease and Trackage Rights Exemption*

[7] N&W argued as a further reason why the arbitrator's award in its case (the Harris award) should not be vacated that "the Harris award did not modify any contractual rights actually possessed by [the union]." Pet. for Recon. 6-8. Nevertheless, it appears clear that Referee Harris thought that contractual rights were being modified (see 6 I.C.C.2d at 727-28) and that the Commission believed an agreement was being modified (6 I.C.C.2d at 728-29), and that the *Carmen* court assumed the same (880 F.2d at 565). An argument that there was, in fact, no contract modification involved would appear to be most appropriately presented at the arbitration level, if the parties are unable to arrive at an agreement without resort to arbitration.

—*Springfield Terminal Co.*, it appears to us that direct remand to the arbitrator could well create greater uncertainties. In an arbitration award filed March 13, 1990, in that proceeding, Referee Harris had the following comments on a remand to an arbitrators (p. 41):

> Arbitrators, unlike judges, do not have continuing jurisdiction after rendering an award. "At common law, an arbitrator did not have authority to modify or correct an award once it had been rendered, because of the doctrine of *functus officia*; i.e. having rendered the award, the arbitrator's task has been fulfilled. Similarly, an arbitrator had no authority to commence a subsequent hearing." [Fairweather, *Practice and Procedure in Labor Arbitration*, 2nd Ed. (1983), at pp. 579-80.]
>
> While this general rule has been modified to allow for technical corrections such as correction of miscalculation of figures, mistakes in description, removal of portions of an award which exceeded the submissions, and correction as to form, corrections may not be made in the merits of the award.

We are not accepting the foregoing statement as necessarily an accurate statement of the law, or as one binding upon the Commission in its dealings with arbitrators. We could not ignore this declaration, however, when made by one of the two arbitrators involved in these proceedings (a former Chairman of the Federal Mediation Board, as noted by N&W, July 2 Pet. 8 n.8). It appeared to us when we decided this case that Referee Harris might decline a direct remand, leading to further delay. Pursuant to our

June 21 Decision, the parties are free to seek arbitration as soon as negotiations reach an impasse.

CSX (Pet. to Recon. 8) and N&W (Pet. to Recon. 18) complain that we have not supplied adequate guidance for the parties or arbitrators. We are disappointed that petitioners are unable to discern sufficient guidance in our extensive decision. We commend to their attention particularly the "Summary of Conclusions," 6 I.C.C.2d at 718-22, and "The Problem Today—Our Resolution," 6 I.C.C.2d at 745-54, where we set forth standards that we believe are more than adequate to guide arbitrators and the parties.[8]

N&W devotes a substantial portion of its Petition for Reconsideration (pp. 9-13) to the following alleged error (p. 10):

> The Commission apparently sees the Art. I, § 2 requirement that collective bargaining rights be preserved as a device that may, in some contexts, grant to a union representing a group of employees of one railroad in a merged system the right to impose its contract on another railroad in the system.

---

[8] Rail Labor's comments on a related issue are relevant here (July 9 Response 4):

> Both carriers complain that the Commission was in error in not making specific findings as to the failure of each of the disputed awards to meet the criteria now posited by the Commission. Such complaints denote a carrier view of the Commission's decision in these cases as changing nothing; that the references throughout the Commission's opinion to the importance of preserving collective bargaining is so much meaningless verbiage . . .

N&W fails to furnish any citation to the June 21 Decision in which this proposition is stated. N&W does include two citations to that decision on the same page as the quotation, but N&W indicates that it agrees with the Commission in both instances. Since the Commission did not make the statement that N&W finds objectionable (as N&W seems to concede, using the terms "apparently," "may, in some contexts") in the June 21 Decision, we cannot find that N&W has made a substantial case for reopening and reconsideration of that decision on this basis.

Finally, both N&W (Pet. for Recon. 14-18) and CSX (Pet. for Recon. 4-7) assert that the Commission erred materially in its treatment of Section 11341(a), discussed in the final three pages of the June 21 Decision (6 I.C.C.2d at 754-56). If we understand the argument, petitioners disagree with our suggestion of a relationship between Section 11341(a) and Section 11347 (6 I.C.C.2d at 754): "We submit that Congress has given us the power in § 11341(a) to exempt mergers and consolidations from the RLA [Railway Labor Act] at least to the extent of our authority under § 11347." Petitioners maintain that our authority is significantly broader and overcomes all legal obstacles including collective bargaining agreements (CBAs).

We fail to see how petitioners' view of the law constitutes a substantial case for reconsidering and modifying the June 21 decision. First, we ruled in that decision that CBAs could be modified pursuant to Section 11347, and did not rely on Section 11341 (a) for that power. We found that our power under Section 11341(a) "reinforces" our authority under Section 11347, but "in accordance with the opinion of the Court of Appeals, we do not rely on § 11341 as a basis for effecting modification of CBAs." 6

I.C.C.2d at 756. Since we did not rely on Section 11341(a), we question whether petitioners' objections even involve the "merits" of the June 21 decision. More significantly, they appear to be complaining that we deferred to the mandate of the *Carmen* court when we observed that court's holding that Section 11341 does *not* authorize the modification of CBAs. This we believe we are obliged to do as a matter of law unless and until we are successful in having that view declared erroneous by the Supreme Court.

Secondly, petitioners appear to be complaining that we have impermissibly limited the reach of Section 11341(a). As we have stated, to the extent we asserted Section 11341(a) authority at all we concluded that such authority must extend "at least to the extent" of our Section 11347 authority in the June 21 Decision. We also indicated in that decision that we are asserting more expansive Section 11341(a) authority before the Supreme Court. 6 I.C.C.2d at 756 n.34. If that Court should rule that the *Carmen* court was in error, we would, of course, consider the appropriate scope of our authority under Section 11341(a).[9] Until such time, we see no basis for petitioners' assertion that our discussion of Section 11341

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[9] We do not disagree with the following statement of CSX (July 2 Pet. 8), but we cannot find it to be the type of challenge to the merits of the June 21 Decision that would justify a stay of that decision:

> If the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles", the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing from collective bargaining agreements.

(a) in the June 21 Decision is in error. We fully considered these matters prior to issuance to our decision. We concluded that this was an insufficient reason to withhold the guidance to participants in railroad consolidations provided by our decision so that such transactions may go forward in the interim. Accordingly, petitioners have failed to demonstrate that there is a strong likelihood that they will prevail on the merits or even establish a substantial case on the merits.

III. HARM TO OTHERS

The harm to other interested parties is not a substantial factor here. CSX reports that the employees covered by the Orange Book were never transferred (July 2 Pet. 4). Only two employees who moved in the N&W transaction are still employed, the remainder having retired (July 2 Pet. 8 n.8).

IV. THE PUBLIC INTEREST

The final hurdle for petitioner to overcome is to demonstrate that the public interest supports the granting of a stay. In our view the public interest requires that the petitions for stay be denied.

The significance of this factor was discussed in *Virginia Petroleum*, 259 F.2d at 925:

> Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes.

Furthermore, it is a "fundamental principle . . . that where Congress has entrusted an administrative

agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.' " *American Power and Light Co. v. SEC*, 329 U.S. 90, 112 (1946), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 117, 194 (1941). In deciding whether to stay a Commission decision, a court will not substitute its judgment for that of the Commission in determining where the public interest lies. *Atchison, Topeka and Santa Fe Railway Co., v. Wichita Board of Trade*, 412 U.S. 800, 825 (1973).

The Commission has conducted an extensive proceeding, involving the submission of briefs and oral argument before the full Commission, and we issued a lengthy opinion in furtherance of the public interest. We described the period of "essentially harmonious relationship between management and labor" prior to the 1980's (6 I.C.C.2d at 720, 740-745) and the subsequent period of conflict over the commands of the Interstate Commerce Act and the Railway Labor Act leading to substantial litigation (6 I.C.C. 2d at 745-52). We explained the factors that we believed

> altered the balance between labor's legitimate right to bargain collectively under RLA procedures over changes in pay, rules and working conditions and management's need to implement operating changes to achieve the benefits of consolidations. 6 I.C.C.2d at 752.

We then said (*id.*) "We hope to restore that balance here." We do not know if we will be successful in our attempt to restore some harmony to labor-management relations in the all-important area of rail consolidations through the standards enunciated in the June 21 Decision, but we strongly believe our

proposals should be tried. Acceding to petitioners' request for a stay would mean that the anticipated benefits to the railroad industry, labor, and the general public they serve would be indefinitely delayed. In our view, the public interest strongly requires that our proposals be applied now by rail management, labor and arbitrators. Moreover, as we have indicated, we believe the public interest strongly supports providing the guidance afforded by our June 21 Decision so that the sorts of transactions covered thereby may go forward pending review by the Supreme Court of the issues complained of by petitioners.

This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The petitions for stay are denied.
2. This decision is effective on July 20, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett. Commissioner Lamboley commented with a separate expression.

Sidney L. Strickland, Jr.
Secretary

COMMISSIONER LAMBOLEY, commenting:

I do not share the views expressed concerning the appropriateness of remanding this matter to the parties rather than to the arbitrator whose decision was at issue on review.[1] Where the Commission in reviewing a specific arbitral award finds error or other reason for remand it is proper to remand that award back to the arbitrator. This would avoid the procedural and substantive problems experienced in *Springfield Terminal.*[2]

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[1] In one sense, an arbitrator acting under the authority of conditions imposed by the Commission pursuant to the Interstate Commerce Act—i.e., under the authority delegated by the Commission—is our agent, akin in standing to an ALJ.

[2] See FD No. 30965, *Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*, decisions served October 26, 1989, December 12, 1989, December 20, 1989 and January 9, 1990.

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(16) (17)

Nos. 89-1027 and 89-1028

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY and SOUTHERN RAILWAY COMPANY,
Petitioners,
v.
AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
Respondents.

CSX TRANSPORTATION, INC.,
Petitioner,
v.
BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR UNION RESPONDENTS

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QUESTION PRESENTED

Whether Interstate Commerce Commission orders authorizing railroads to consummate 49 U.S.C. 11343(a) transactions exempt railroads participating therein from collective bargaining agreement obligations by virtue of the provisions of 49 U.S.C. 11341(a)?

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BRIEF FOR UNION RESPONDENTS

On March 26, 1990, this Court granted the petitions of CSX Transportation, Inc. (CSXT) and Norfolk and Western Railway Company ("N&W") and Southern Railway Company ("Southern," jointly "NS") for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision of that court in *BRC v. ICC,* 880 F.2d 562 (Pet. App. 1a-28a).[1] This brief is respectfully submitted by the Brotherhood of Railway Carmen ("BRC") and the American Train Dispatchers' Association ("ATDA") ("Union Respondents"), in opposition to the briefs filed by the Petitioners and by the Federal Respondents, United States and Interstate Commerce Commission ("ICC" or "Commission").[2]

STATUTES INVOLVED

Section 11341(a) of the Interstate Commerce Act ("ICA" or "Act"), 49 U.S.C. § 11341(a), the provision upon which the court of appeals based its decision, is but one of several interdependent provisions of subchapter III of Chapter 113, which must be read and applied as a whole. All of the provisions of subchapter III were, prior to recodification, subsections and subparagraphs of one section of the Act.[3]

COUNTERSTATEMENT OF THE CASE

These cases involve the extent of Commission authority, if any, under section 11341(a) of the Act, to modify or eliminate the statutory and contractual rights of rail-

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[1] References to "Pet. App." are to the appendix to the petition in No. 89-1028.

[2] The United States did not participate in the proceedings below and the Commission did not seek review by this Court of the court of appeals decision.

[3] Section 11341(a) (formerly § 5(12), 90 Stat. 63); section 11343(a) (formerly § 5(2)(a), 63 Stat. 486); section 11343(b) (formerly § 5(b), *Id.*); section 11344(b)(1) (formerly § 5(2)(c), 63 Stat. 485); section 11344(c) formerly § 5(2)(b), *Id.*); and section 11347 (formerly § 5(2)(f), 90 Stat. 65). *See* App. A.

road employees whose employers in 1980 and 1982 placed their railroads under the separate common controls of Norfolk Southern Corporation ("NSC") and CSX, Incorporated ("CSX") after obtaining ICC authority to do so.

A. The CSX, Inc. Control And Merger And The Norfolk Southern Corp. Control

In 1980, the ICC authorized CSX to obtain control of the railroads then controlled by the Chessie System and the railroads controlled by Seaboard Coast Line Industries.[4] *CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 363 I.C.C. 521 (1980) ("*CSX Control*"). That control was consummated in 1980 when CSX exercised the authority granted and assumed control and management of the operation and properties of the two railroad systems.

In 1982, the Commission authorized the NSC to assume control of the N&W, a product of numerous earlier mergers involving N&W, Virginian Railway, Wabash Railroad, and Nickelplate Railroad, among others, and the Southern Railway System and its numerous railroad subsidiaries. NSC effected the authority granted and assumed control and management of the operations and properties of N&W and Southern in 1982.

In order to make their respective controls of these railroads operationally and economically efficient, CSX and NSC had to have connections constructed between them, have these railroads operate over each others tracks,

[4] Chessie System controlled the Chesapeake and Ohio Railway Company ("C&O"). Seaboard Coast Line Industries controlled the Seaboard Coast Line Railroad Company ("SCL"), which had resulted from a merger of the Atlantic Coast Line Railroad Company ("ACL"), the Seaboard Air Line Railroad Company ("SAL") in 1962, and the Louisville and Nashville Railroad Company ("L&N"), among others. In December, 1982, SCL merged with L&N to form the Seaboard System Railroad, Inc. ("SSR"). In July, 1986, SSR changed its name to CSX Transportation, Inc. and in 1987, after the transfers giving rise to the *ATDA* case, C&O merged into CSXT, a petitioner herein.

jointly use some tracks, coordinate certain operations and, abandon lines that would become superfluous after common control was effected. The railroads which would become subject to CSX's control filed some 17 separate applications and the future subsidiary railroads of NSC filed some 6 applications for the required ICC approval of these merger objectives, all of which were granted along with the basic control applications filed by CSX and NSC.[5] A descriptive list of these separate applications is set forth in the ICC's summary of its decisions in these cases at 363 I.C.C. 521-25 (CSX) and 366 I.C.C. 173-74 (NSC).

In order to demonstrate to the Commission that their respective applications were "consistent with the public interest" as required by section 11344(c), 49 U.S.C. § 11344(c), CSX and NSC presented evidence of their intentions regarding future operations and consolidations that would improve service and efficiency. Neither NSC nor CSX requested the Commission to approve any of the proposed changes except those changes noted above for which prior ICC approval was required by the ICA; nor were they bound to carry out any of changes which they presented in support of their applications.[6]

B. The Transfer Of SCL Work And Employees At Waycross, Georgia To C&O At Raceland, Kentucky; The Transfer Of N&W Work And Employees At Roanoke, Virginia To Southern At Atlanta, Georgia

The employees of all of the railroads involved in the subject transfers maintained through their union repre-

[5] No applications were submitted by any party seeking ICC approval to consolidate shops, yards, offices or other similar facilities, the activities complained of in the instant cases.

[6] The Commission has long held that its orders are permissive and when effected an applicant is bound only to adhere to the conditions attached to those orders. *See, e.g., Rio Grande Industries—Purchase & Trackage Rights—Chicago, Missouri & Western Ry. Co. Line Between St. Louis, MO and Chicago, IL*, 5 I.C.C.2d 952 (1989); *Tex. & N.O.R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151, 159 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); *Valdosta Southern R.R.—Purchase*, 282 I.C.C. 705, 711 (1952); *Gulf, Mobile & Ohio R.R. Co.—Purchase*, 267 I.C.C. 265, 269 (1947).

sentatives collective bargaining agreements with their respective employers and, in the case of the SCL employees, maintained a separate agreement, known as the "Orange Book", from the color of its cover, which provides each employee covered by its provisions with a guaranteed income for the remainder of his or her working life. (Pet. App. 54a-55a.) Moreover, the protected employees were guaranteed that neither they nor their work would be transferred beyond the boundaries of the SCL system. *Id.* In exchange for those protections, SCL was granted the right to transfer work and employees within the merged ACL-SAL (SCL) system but not beyond it. (Pet. App. 83a.)

In August 1986, CSXT, purportedly pursuant to Article I, Section 4 of the *New York Dock* conditions[7] served notice on the Brotherhood of Railway Carmen that the SCL freight car heavy repair shop in Waycross, Georgia would be closed on December 31, 1986 and that the freight car heavy repair work as well as certain storeroom work at Waycross would be transfered to the C&O's Raceland, Kentucky repair facility and made subject to the C&O collective bargaining agreement. (Pet. App. 55a.) CSXT proposed to abolish 121 positions in the carman craft at Waycross and to establish 99 positions in the carmen craft at Raceland. All of the carman craft employees were subject to a collective bargaining agreement ("CBA") with CSXT and about one-half of those employees were also entitled to the protections of the "Orange Book," which, as noted above, prohibited the transfer of the work and the protected employees to Raceland. (*Id.*)

About two weeks after CSXT's intended transfer, N&W notified the American Train Dispatchers' Association of its intention to transfer all work of locomotive power distribution and assignment from the N&W at

[7] Article I, Sections 1(a), 2, 3 and 4 of the *New York Dock* conditions, 360 I.C.C. 60, 84 (1979), are set forth in Appendix B to this brief.

Roanoke, Virginia, where employees were represented by ATDA, to the Southern in Atlanta, Georgia, where the employees performing that work were unrepresented, being considered management personnel by Southern. The N&W employees would be considered for work in Atlanta. (J.A. 8-10).[8]

C. The Arbitration Awards

The parties were unable to reach agreement under section 4 of the *New York Dock* conditions. The respective disputes between the parties were submitted to arbitrators.[9] The BRC and the ATDA disputed the jurisdiction of the arbitrators to change the wages, rules or working conditions of employees or to eliminate any of their existing Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA") or CBA rights. (J.A. 12-13; Pet. App. 61a-62a.) Regarding the separate Orange Book protection applicable to half of the affected carman employees at Waycross, BRC argued that the arbitrator had no jurisdiction to affect any of the substantive rights provided employees by that agreement, and that "section 3 of the *New York Dock* conditions absolutely preserves workers' rights and benefits under existing protection agreements." (Pet. App. 64a.)

On behalf of the N&W employees it represented, the ATDA argued that the ICC could not eliminate the CBA rights or the collective bargaining rights the employees had established through their representation by ATDA by removing them and their work to a railroad on which they had no such established rights. (J.A. 19.)

The *Carmen* award was issued in March 1987 followed by the *ATDA* award in May 1987.

Holding that an arbitrator under section 4 was a "quasi-judicial extension of the ICC" and therefore

[8] References to "J.A." are to the consolidated Joint Appendix filed in these cases.

[9] Technically, the disputes were submitted to three-person committees: two partisan members and a neutral. The neutral is the effective arbitrator in such arrangements.

"must strictly follow the ICC's interpretation of its own authority" (Pet. App. 80a), the *Carmen* case arbitrator followed the ICC's decision in the *DRGW* case [10] which for the first time had held that section 11341(a) granted the Commission "expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements to the extent the statute and terms of the agreements bar implementation of the transaction." (Pet. App. 80a.) Indeed, "[a]ccording to the ICC, Section 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation." (*Id.*) The arbitrator then held that CSXT could transfer work and employees from the CSXT and its agreement to the C&O and its agreement because to permit the preservation of the CSXT employees' agreement rights, including their Orange Book guarantee that their work would not be transferred, "would for all practical purposes block the transaction," *i.e.*, the 1986 transfer of work and employees to the C&O. (Pet. App. 85a.) [11]

The arbitrator, however, felt that some of the employees' Orange Book rights could be protected without impeding the completion of the transfer. He found that without the right granted by the employees in 1962 to the then newly-merged SCL to "transfer work and workers throughout the merged (SAL-ACL) system . . . the point seniority terms of the [collective bargaining] working agreement would have restricted the Carriers from

[10] *Denver and Rio Grande Western Railroad Co.—Trackage Rights —Missouri Pacific Railroad Co.*, Finance Docket No. 30000 (Sub-No. 18) (October 19, 1983) (not printed). A copy of this unpublished ICC decision is attached to CSXT's Brief, filed February 21, 1989, in D.C. Cir. No. 88-1724.

[11] It is the Union Respondents' position that this is an erroneous use of the term "transaction" as found in sections 11341(a) and 11343. The term as used in the statute does not include changes made by a merged or commonly controlled railroad following, and as a result of, an approved and consummated statutory "transaction". *See infra*, 24-26, 29-30, 31-32.

moving employees." (Pet. App. 83a.) [12] The arbitrator concluded that the Orange Book prohibited the movement of work and workers beyond the limits of the former SCL property and therefore would bar transfers of work and employees to the C&O at Raceland, KY thereby "effectively thwart[ing] . . . [the] transfer[]." (*Id.* 83-84a.) He held that the employees' rights "must be subordinated to the Carriers' right to engage in the authorized *New York Dock* transaction" [13] by permitting the transfer of their work (*id.* 84a); but, he prohibited the transfer of the "Orange Book" employees because recognition of that particular agreement right of the employees would "only slightly impair the transaction." (*Id.*)

Some two months following issuance of the *Carmen* award, a second arbitrator issued his decision and award in the *ATDA* case. He noted that between "1981 and 1983 at least five arbitrators ruled that the ICC did not desire that changes of rates of pay, rules or working conditions, or of representation under Railway Labor Act, occur through arbitration under Section 4 of the New York Dock conditions." (*Id.*) He then proceeded to quote extensively from the Commission's 1985 *Maine Central* decision [14] in which the ICC held that it "is that [ICC] order, not RLA or WJPA, that is to govern employee-management relations in connection with the approved

[12] The railroads' practice of negotiating agreements such as the Orange Book and other similar agreements (*see* footnote 26, *infra*) to overcome the transfer restrictions in CBA's has been rendered unnecessary by the Commissions' expansive interpretation of its authority under section 11341(a).

[13] The arbitrator, following the ICC's rulings, viewed the 1986 transfer of work as having been authorized by the Commission rather than simply a result of the 1980 statutory transaction (the control) authorized by the Commission. *See infra*, 26, 31-32.

[14] *Maine Central R.R.—Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30522 (September 16, 1985) (not printed), *aff'd per curiam sub nom. Railway Labor Executives' Association v. I.C.C.*, 812 F.2d 1443 (D.C. Cir. 1987) (Table). A copy of this unpublished ICC decision is attached as Addendum C to ATDA's Brief, filed March 21, 1989, in D.C. Cir. No. 88-1694.

transaction." (J.A. 17.) [15] The arbitrator also quoted that portion of the Commission's decision in the *Maine Central* case in which it made clear its intent to use section 4 of the *New York Dock* conditions to compel arbitration of new collective bargaining agreements (*id.*):

> Such a result [governance of labor relations by ICC orders] is essential if transactions approved by us are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions.

Holding that he derived his authority from the ICC; that "it is clear that the ICC believes that its order supercedes Railway Labor Act protection"; and, that the "conclusion is inescapable" that in the view of the ICC, "the inconsistencies between Sections 2 and 4 of the New York Dock conditions are to be resolved in favor of Section 4," the arbitrator held that the N&W could transfer the work and the employees to the Southern at Atlanta. (J.A. 19.)[16]

The arbitrator also held that depriving the affected employees of their existing collective bargaining representative as well as their collective bargaining agreement "does not change the rights of the individual employees" (*id.* 19) because once on the property of Southern they could petition the National Mediation Board to *reestablish* their right to have ATDA represent them. (*Id.* 20.)[17] The arbitrator imposed the implementing agreement proposed by the N&W transferring the work and the employees to Southern without their existing agreement or representation rights.

[15] "WJPA" refers to the "Agreement of May 1936, Washington, D.C." between all of the unions and most of the railroads providing protection for employees affected by railroads' "coordination" of facilities. It is the protective formula upon which all later protective formulae have been based and is still in effect.

[16] Union Respondents had contended that no inconsistency existed between Sections 2 (preservation of collective bargaining and contract rights) and 4 (arbitration of implementing agreements providing for the selection of forces and assignment of employees) of the *New York Dock* conditions when those provisions are applied in accordance with industry practice between 1940 and 1983. The work forces are selected to perform the coordinated or consolidated work and employees were assigned to those work forces. Their individual rights under their existing agreements, however, were preserved to them until changed by voluntary agreement.

D. The Commission Proceedings

Both awards ultimately were appealed to the Commission. In the *Carmen* case, the Commission held that the arbitrator had correctly interpreted the Commission's view of its authority and affirmed the arbitrator on that point. (Pet. App. 43a.) However, it concluded that the arbitrator had committed "egregious error" in holding that the employees covered by the Orange Book could not be required to transfer to Raceland, Kentucky. (*Id.*) The "slight impairment of the transaction" found by the arbitrator was held to be an unacceptable standard as it would "permit[] a provision of a collective bargaining agreement to conflict with the implementation of an approved transaction" and thereby "effectively undercut the Commission's authorization of the transaction here." (*Id.* 43a-44a.) The Commission concluded that the evidence did not support the arbitrators finding of "slight impairment" of the transaction and reversed that finding, remanding the case to the arbitrator for a further review consistent with the Commission's decision.[18] (*Id.* 44a-45a.)

In reviewing the *ATDA* award, the Commission relied upon its decision in *Maine Central* and affirmed the

[17] The arbitrator also concluded that representation rights obtained through recognition by a railroad employer, as were ATDA's rights here, were somehow inferior to such rights obtained by election. The National Mediation Board disagrees. *Grand Trunk Western R.R. Co.—Merger*, 17 NMB 282, 303 (1990).

[18] The only evidence relied upon by the Commission to reach this conclusion was that related to a reduction in cost savings and operating efficiencies, neither of which it quantified. (*Id.* 44a.)

arbitrator's holding that the terms of its 1982 order approving the NSC control of N&W and Southern "and specifically the compulsory, binding arbitration required by Article I, Section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements" and any "action taken under our control authorization is immunized from conflicting laws by section 11341(a)." (No. 89-1027, Pet. App. 35a.) The Commission thought the arbitrator's award "somewhat confusing" on the issue of loss of representation but concluded the National Mediation Board could determine whether ATDA had any representative status on Southern. (*Id.* 38a.)[19]

E. The Court Of Appeals Decision

The Union Respondents sought review of the Commission's decisions in the court of appeals which heard the cases simultaneously and issued a consolidated opinion. (Pet. App. 1a-28a.)

The court held that "§ 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees", reversed the ICC's decision and remanded the cases "with respect to the ICC's RLA holdings in order that the agency may determine whether further proceedings are necessary." (*Id.* 26a.)

F. The ICC Decision On Remand

Just nine days after the court of appeals issued its decision in the instant cases, the Commission issued a decision of major significance in the application and interpretation of section 11341(a) in a case involving the purchase by a shortline railroad of 102 miles of CSXT line in

[19] The issue of whether the employees' pre-existing right to representation by the ATDA had been preserved as *New York Dock*, Article I, Section 2 and 49 U.S.C. § 11347 requires, was not addressed by the ICC.

Florida.[20] The Commission held that this Court's *P&LE* decision (*see infra*, n.36) could not "be properly applied" to cases arising under section 11343(a), 49 U.S.C. § 11343 (a), in which protection is afforded employees; that it did "not dispute the validity" of the lower courts' limited holding; that it had never "relied upon . . . § 11341(a) . . . to require that agreements be modified"; and that its authority to override CBA's was derived from section 11347.[21]

The Commission's decision following remand of these cases from the court of appeals is reported at 6 I.C.C.2d 715 ("remand decision"). It followed an order reopening the proceeding for public comment, a 3-hour oral argument held on January 4, 1990, before the full Commission by all interested parties, the submission of extensive documentation by rail labor of the legislative, judicial and administrative history of employee protection since its inception in the railroad industry and, the filing of post-argument briefs by the railroad management interests participating. (*Id.* 717-718.)[22]

In its remand decision, the Commission adhered to the ruling of the court of appeals that it was not authorized by section 11341(a) to override provisions of collective bargaining agreements, but concluded that such authority was unnecessary in any event since that authority had been afforded the Commission by Congress' inclusion of the employee protective provisions of section 5(2)(f)

[20] *Brandywine Valley Railroad Company—Purchase—CSX Transportation, Inc. Lines in Florida*, 5 I.C.C.2d 764 (decided August 3, 1989; served August 11, 1989).

[21] *Brandywine*, 5 I.C.C.2d at 772 n.5. The Commission now disputes the validity of the court of appeals' decision and contends that its "absolute authority" over labor management relations in cases subject to section 11343 of the Act is derived from both section 11341(a) and section 11347. *See, infra* 22.

[22] CSXT, NS, Union Pacific Railroad, Missouri Pacific Railroad, Conrail, Atchison, Topeka & Santa Fe Railway and the National Railway Labor Conference (rail management's national negotiating arm) presented oral argument.

in the 1940 Act (*id.* 750-751) and held that section 11341(a) empowered the ICC "to exempt mergers and consolidations from the RLA at least to the extent of our authority under § 11347." (*Id.* 754.)

The Commission's review of history compelled it to "concede that our assertion of this power is fairly recent, as both RLEA (Outline, 4-9) and the *Carmen* court assert." (*Id.* 755.)[23] It admitted that its decisions in 1983 (*DRGW*) and 1985 (*Maine Central*) had contributed to a deterioration of labor-management relations which had not theretofore existed in this area. (*Id.* 745-746.) The Commission noted that "a relatively harmonious working relationship when implementing ICC-approved consolidations [had existed] for almost forty years" prior to its 1983 and 1985 decisions and the inclusion of Section 2 in *New York Dock* in 1979. (*Id.* 745.)[24]

The Commission interpreted Section 2 of *New York Dock* as merely providing employees with "the opportunity to bargain collectively over their basic and continuing conditions of employment, as contemplated by the RLA" but permitting modification of collective bargaining agreements "when necessary to complete an approved merger or consolidation." (*Id.* 749.) To support that interpretation the ICC cited no evidence or authority, but relied solely upon assumptions of what "must have happened": the 1940-1980 arbitrators "*must have defined* them [the terms 'selection of forces' and 'assignment of

[23] Reference is to the Outline of Oral Argument submitted by rail labor at the oral argument of January 4, 1990, together with supporting documentation entitled "Materials in Aid of Oral Argument."

[24] The ICC's conclusion that the 1979 inclusion of Section 2 of the *New York Dock* conditions, as required by section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. No. 94-210, 90 Stat. 31 ("4R Act"), contributed to labor unrest is based upon the assumption that the inclusion of section 2 added something new to the law instead of simply confirming the law as it had always been applied to that time.

employees'] broadly enough to include contract changes involving movement of work (and *probably* employees) as well as adjustments in seniority" (*id.* 721);[25] "[i]t *appears* that arbitrators, management and labor developed approaches in the 1940-1980 period for resolution of the inevitable conflicts with CBAs that permitted the carrying out of the transaction while maintaining labor peace" (*id.* 721-722);[26] between 1940 and 1980 "the disruptive effect on labor *appears* to have been successfully handled through WJPA-type negotiation and arbitration" (*id.* 740)[27]; "[m]ost of the changes were *presumably* made through WJPA (or *New Orleans*)[28] negotiations with only the more difficult issues being decided by an arbitrator" (*id.* 741), but the ICC cited no

[25] Attached as Appendix C to this brief are sections 4 and 5 of WJPA and excerpts from the Journal of the WJPA Negotiations in which its authors discuss the meaning of "selection of forces" and "assignment of employees". This and other excerpts from that Journal were supplied to the ICC at the January 4, 1990 argument.

[26] In the numerous merger and control cases which began with the *Norfolk & Western—Virginian* merger case in 1959 and ended in 1972 when the *Penn Central* met with disaster, labor and management executed so-called attrition agreements in which the railroads provided guarantees of lifetime employment in return for the right to move employees and their work throughout the merged or commonly-controlled systems. *Norfolk & Western Railway Company —Merger, etc., Virginian Railway Company*, 307 I.C.C. 401, 439 (1959); *Chicago & N.W. Ry. Co.—Purchase—Minneapolis & St. L. Ry. Co.*, 312 I.C.C. 285, 296 (1960); *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger*, 324 I.C.C. 1, 50 (1964); *Atchison, T. & S. Ry. Co.—Merger*, 324 I.C.C. 254, 255, 261 (1965); *Pennsylvania R.R. Co.—Merger—New York Central R.R. Co.*, 328 I.C.C. 304, 313 (1966); *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228, 277-279 (1967); *Seaboard Coast Line R.R. Co.—Merger—Piedmont & N. Ry. Co.*, 334 I.C.C. 378, 384-385 (1969).

[27] The only "WJPA-type negotiation and arbitration" which occurred during this period was the decision in WJPA Docket No. 141 in which the arbitrator rejected Southern's defense of 5(11) [11341(a)] against employees' WJPA claims. That decision was supplied to the ICC at the January 4, 1990 oral argument and is attached hereto in pertinent part as Appendix D.

[28] The predecessor of *New York Dock*.

such arbitrations; while the scope of the terms "selection of forces and assignment of employees" is "not well-defined . . . [i]t *must extend beyond* the mere mechanism for selection or assignment of employees, *and include* the modification of certain important contractual rights"[29] (*id.* 742); "[w]e *assume* they [labor and management] did what was necessary to permit the carrying out of the merger, including . . . those projects that were direct results of the merger" (*id.* 743); "[w]e *believe* that arbitrators have successfully followed this narrow and difficult path in the past . . ." (*id.* 753).[30] (Emphasis added.)

The only reference to any type of evidence or authority on which to base its assumptions as to what "must have happened" between 1940 and 1980 to maintain the labor-management harmony which then existed, is a list of 95 agreements relating to transfers submitted by CSX. (*Id.* 743.) The Commission concedes that the instances cited "cover[] a later period" and are referred to only for "some guidance" (*id.*) but, as Commissioner Lamboley's dissent notes (*id.* 764 n.55.), they afford no assistance on the issue of whether employees or unions had ever been *required* to arbitrate contract modifications or elimination prior to 1981. Only nine arbitrations were listed and none of them indicate whether they were voluntary or compulsory arbitrations.

As noted in the dissent of Commissioner Lamboley (*id.* 763), the Commission in this decision ignored its

[29] *But see,* App. C.

[30] Arbitrator Harris had stated in his *ATDA* award decision that "[p]rior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules, or working conditions had never been raised in a section 4 proceeding." The ICC does not challenge the accuracy of Harris' statement but dismisses it with the comment that it could be read as "indicating that arbitrators did not make such changes before 1981 . . . [or] that such changes were made and not challenged." (*Id.* 743 n.10.) Such changes, of course, had been made, but only by agreement as noted in footnote 26, *supra.*

own initial decision creating the *New York Dock* conditions:[31]

> When adopting § 2, the Commission noted that it "appears acceptable to all parties" and rejected a labor proposed addition relating to [preserving] subcontracting agreements, stating that "the section, as now written, preserves all existing agreements and, therefore, the suggested language is redundant and unnecessary." *Id.* [360 I.C.C.] at 73.

The remand decision did not address the provisions of Section 3 of *New York Dock*[32] which preserve to employees covered by protective agreements the rights and benefits provided by those agreements and provide employees the option to choose between benefits of an applicable protective agreement[33] and those provided by the conditions imposed by the Commission.

The Commission's remand decision, although adhering to the court of appeals' ruling that section 11341(a) provided it no authority to override collective bargaining agreements, nevertheless accomplished the same result through its claim of virtually identical authority under section 11347. Its assertion of authority to approve by implication all future changes which a railroad may deem necessary to "complete," "implement" or "carry-out" an already consummated merger or control; its assumption that the terms "selection of forces and assignment of employees" required by section 11347 to protect the interests of employees in merger and control cases, "must extend beyond the mere mechanism for selection or assignment of employees, and include modification of certain important contractual rights" (*id.* 742); its reading of the plain language of section 2 of *New York Dock* as preserving employee rights only until it becomes "necessary" to modify or eliminate them; its

[31] *New York Dock Ry. Co.—Control—Brooklyn Eastern District Terminal Co.,* 360 I.C.C. 60 (1979).

[32] 360 I.C.C. at 84-85; Appendix B.

[33] In this case the "Orange Book".

failure or refusal to confront the plain language requirements of section 3 of *New York Dock*; its conclusion that section 11341(a) removes resort to RLA procedures to protect employees' contract and representation rights; and, the impossible burden it would place upon employees to show that movement of work and employees from one facility to another is not a "necessary" element in the consolidation of those facilities, all effect the same result as would a ruling that section 11341(a) expressly overrides all RLA and collective bargaining agreement rights of employees whenever a railroad wishes to take any action which could be said to be connected to the consummation of its ICC-approved merger or control.

SUMMARY OF ARGUMENT

The ruling of the court of appeals that section 11341(a), 49 U.S.C. § 11341(a), "does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees," is correct. As an implied repeal statute, section 11341(a)'s language must be narrowly construed and the plain language of that section does not indicate that its coverage extends past restraining or prohibitory laws to collective bargaining agreements. Additionally, there is no indication in the legislative history of section 11341(a) that it was intended to interfere with a carrier's collective bargaining agreement obligations and, the ICC, during the sixty-three years that passed between the initial enactment of section 11341(a)'s predecessor and the Commission's decision in the 1983 *DRGW* case, consistently disavowed any jurisdiction over labor relations matters by virtue of section 11341(a) or any other provision of the Interstate Commerce Act and, in the only case presented to it with the specific request to override agreements pursuant to section 11341(a), the ICC held that it had no authority to grant the requested relief. Indeed, the Commission repeatedly disclaimed any expertise whatever in labor relations matters. The court below concluded that in the instant cases the Commission departed from this long-standing position with no explanation, or even acknowledgment that it was doing so and, the Commission has since effectively acknowledged the accuracy of that conclusion.

The actions of the railroads during this period confirm the ICC's lack of authority to override contracts for, in order to consolidate operations and facilities following ICC approval of numerous mergers, they provided employees with guarantees of lifetime employment in return for the right to transfer work and employees across seniority district boundaries in contravention of existing collective bargaining agreements. Such agreements would have been unnecessary had section 11341(a) provided that relief.

The pre-1983 conclusions of the ICC are supported by the history of Congress' treatment of labor relations in the railroad industry. Congress, in its enactment of and amendments to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, has deliberately and repeatedly refused to require compulsory arbitration of "major" disputes that the Commission now requires by its interpretation of the arbitration requirements of the *New York Dock* conditions.

In any event, section 11341(a)'s exemption authority extends only so far as is necessary for a railroad to carry out an approved transaction in accordance with the conditions imposed by the Commission. Section 11347, 49 U.S.C. § 11347, requires the Commission to impose conditions which preserve the collective bargaining agreement rights of employees and prohibits deprivation of any employees' rights under protective agreements such as the "Orange Book". It is illogical to conclude that conditions required by Congress to be attached to a permissive order can be considered as in conflict with the very order to which they must be attached.

The subject contracts rights of the affected employees are property rights and neither the ICA nor the *New York Dock* conditions provides compensation for the elimination of the prohibitions against transfers of work and employees contained in the CBAs and the Orange Book. Interpreting section 11341(a) as authorizing the elimina-

tion of those rights, particularly where the employees have no voice in accepting or rejecting the ICC order effecting that elimination, renders the validity of that section questionable under the due process and just compensation clauses of the Fifth Amendment. An alternative interpretation is available and should be adopted.

ARGUMENT

The Petitioners and Federal Respondents seek reversal of the ruling of the court of appeals that section 11341(a) does not authorize the Commission to override provisions of collective bargaining agreements. They also seek remand of that ruling "for consideration of any remaining questions, including those that are now pending before the Commission and that may be raised in subsequent proceedings for judicial review." (FR 21-22.)[34]

In their motion to dismiss the writs of certiorari, the Union Respondents contended that the meaning and effect of section 11341(a) was no longer material to the disputes pending between them and CSXT and NS over the latters' right to ignore their contractual and RLA obligations to those employees. (Motion to Dismiss, 5.) Union Respondents remain of that view since the Commission held in its remand decision that whatever might be the meaning or effect of section 11341(a) standing alone, its authority to modify or eliminate the collective bargaining agreement rights of employees is provided, controlled and, limited by section 11347 (*id.* 720). However, the question whether the ICC is correct in now asserting that Section 11347—apart from Section 11341(a)—gives its arbitrators the power to override provisions in a CBA, was not considered by the court below and is not a question presented for review by the writs. *See* Rule 14.1(a) of the Rules of this Court.

[34] "FR" references are to the brief filed in these consolidated cases by the Federal Respondents on May 25, 1990. References to the separately filed briefs of Petitioners are "CSXT" and "NS", respectively.

I. THE HOLDING OF THE COURT OF APPEALS THAT SECTION 11341(a) DOES NOT EMPOWER THE ICC TO OVERRIDE COLLECTIVE BARGAINING AGREEMENTS IN CONSOLIDATIONS RESULTING FROM A MERGER OR CONTROL IS CORRECT AND SHOULD BE AFFIRMED

A. The Court's Ruling On The Law Is Correct

The Federal Respondents characterize the ruling of the court below as holding that "the exemptions provided by Section 11341(a) do not apply to those laws governing enforcement of contractual obligations." (FR 21.) The court did not so hold but restricted itself to the very narrow ruling that "§ 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees." (Pet. App. 26a.) It remanded the case to the Commission with respect to that agency's "RLA holdings in order that the agency may determine whether further proceedings are necessary." (*Id.*)[35]

As the court noted in its review of the legislative history of section 11341(a) (*id.* 13a-19a), Congress' emphasis has always been centered on the effort to ensure that no state or federal statute, particularly anti-trust statutes, could prevent the effectuation of a Commission order approving a section 11343 transaction. It noted that when an attempt was made to amend the RLA to provide the ICC power to suspend excessively generous wage agreements between railroad carriers and their employees it was rejected. (*Id.* 18a.)

The court reviewed the Commission's pre-1983 decisions and concluded that historically the ICC had held that section 11341(a) did not relieve carriers from collective bargaining agreements which limited transfers of employees, but that in its 1983 *DRGW* decision, it had departed from that view without explanation (*Id.* 21a-23a),

[35] The Commission's remand decision also holds that section 11341(a) enables the ICC to "foreclose [employees'] resort to RLA procedures" for redress of loss of contract rights. (6 I.C.C.2d 754.)

a conclusion with which the ICC now concurs. (Remand decision, 6 I.C.C.2d 755.) The court held that in failing to state any reason for its departure from precedent the Commission erred. Union Respondents respectfully submit that this conclusion of the court is correct. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962), quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947):

> "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . ."

The court then held that the Commission had erred in relying on section 11341(a) as providing it exemptive authority over collective bargaining agreements (Pet. App. 26a) and, in light of its holding on section 11341(a), the court believed it unnecessary to address "either the Unions' arguments that to do so [override collective bargaining agreement rights] would be unconstitutional or their claim that, in amendments to the Act in 1976, Congress specifically preserved employees' contractual rights." (*Id.*) The court declined to address the ICC's theory that the employee protective conditions required by Section 11347 are exclusive or that section 4 of *New York Dock* "gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, and to override any contrary provisions of a CBA." (*Id.* 25a.) The court stated that the ICC had "not argued the first theory to us at all" (*id.*) and concluded that if it had "not abandoned its § 11347 theory and the § 4 rationales altogether," it should "reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position.[36]

[36] *Pittsburgh & Lake Erie R. v. Railway Labor Executives' Association*, 491 U.S. —— (1989).

The court emphasized the fact that these cases did *not* involve the obstruction of an ICC order approving the merger and control of railroads as the carriers' transfers of work and employees took place "well after the consummation of the ICC-approved transactions[s] . . . ." (*Id.* 21a.) The court concluded that this fact alone reconciled this Court's decisions interpreting section 11341(a) with the result the court reached because in each of those cases[37] the "question of exemption arose before the consummation of the approved transaction." (*Id.*)

Union Respondents respectfully submit that the court of appeals decision in these cases is correct. As will be demonstrated below, whatever the Commission's exemptive authority may be in non-labor cases, the Congress did not grant, nor did it intend to grant, to the ICC authority to override the statutory and contract rights of employees before, during, or after consummation of a section 11343 transaction, by virtue of its enactment of the provisions in section 11341(a).

B. The Court Correctly Declined To Defer To The Commission's Interpretation Of Section 11341(a)

The Federal Respondents and Petitioners argue that the Commission's conclusions regarding its authority are reasonable and therefore entitled to deference which the court of appeals did not accord it. (FR 42-43, NS 38-39, CSXT 28-29.) The court of appeals held that this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) did not require it to defer to the Commission's interpretation of section 11341(a) as authorizing that agency to exempt carriers from collective bargaining agreement obligations because that court's examination of the language and legislative history of section 11341(a) indicated Congress did not

[37] *Schwabacher v. United States*, 334 U.S. 182, 200-01 (1948); *Seaboard Air Line R. v. Daniel*, 333 U.S. 118, 121 (1948); *Texas v. United States*, 292 U.S. 522, 531-532 (1934). In 1952, the ICC held these cases not applicable to private contracts. *Gulf, Mobile & Ohio R.R. Co.—Abandonment*, 282 I.C.C. 311, 335 (1952).

extend exemption authority to collective bargaining agreements. (Pet. App. 11a-19a.)

Union Respondents respectfully submit that the court of appeals was correct in its reading of the statute and congressional intent for the reasons relied upon by that court. Moreover, when section 11341(a) is read in conjunction with the plain language of section 11347, as Union Respondents submit it must be read, the validity of the lower court's judgment is confirmed.

In the instant cases, the Commission has now conceded that its "assertion of this power [over employee statutory and contract rights] is fairly recent" (remand decision, 755) and, as the court correctly noted (Pet. App. 23a), the ICC made no attempt to justify its assertion of that power at this time when it had consistently and historically refused to claim such power in the past (remand decision, 755).

In addition, since 1983, the Commission has been less than a model of consistency on the subject of its section 11341(a) authority over labor-management relations. For fifty years prior to its *DRGW* decision, the ICC disavowed expertise in labor matters. *See, infra*, 32-33. In *DRGW*, it held it could modify employee rights under contracts if the modifications (crew assignments in a trackage rights agreement) were a part of the contract it approved. Two years later it held its orders, and not labor contracts or the RLA, govern labor relations. *Maine Central, supra.* In the instant cases, prior to the court of appeals decision, the ICC's primary claim of authority to override employee rights was grounded in section 11341(a), but immediately after that court's decision, it agreed with the validity of the court's ruling, disavowed ever having relied on section 11341(a) and placed its full reliance on section 11347 as the source of its authority. *Brandywine, supra* 11. Following this Court's grant of the petitions of CSTX and NS, the Commission returned to its earlier position that section 11341(a) provided the exemption authority to modify or eliminate employee contract rights. (FR 22, *et seq.*) Recently,

the Commission extended the reach of its governance of employee contract rights to the interpretation of collective bargaining agreements.[38] But, on October 5, 1990, the Commission issued a decision in a non-labor setting approving an assignment of trackage rights to the Delaware & Hudson Railway, but refused to decide whether the assignability of those rights was prohibited by other contracts between the parties. The Commission refused to rule on that issue stating: "The Commission normally avoids interjecting itself into contract disputes [citation omitted]". *Canadian Pacific Limited, Et Al.—Purchase and Trackage Rights—Delaware & Hudson Railway Company*, 7 I.C.C.2d 95, 119 (1990).

For these reasons, Union Respondents respectfully submit that the ICC decisions in the instant cases are not entitled to the deference which would normally be accorded them.

II. SECTION 11341(a) DOES NOT AUTHORIZE THE COMMISSION TO OVERRIDE COLLECTIVE BARGAINING AGREEMENTS

Petitioners and Federal Respondents argue that the court of appeals erred in failing to conclude that a party, after entering into a merger or control approved by the Commission, is exempt from any legal obligations imposed by a collective bargaining agreement as well as from the assertion of rights derived from the Railway Labor Act which might impede the carrying out of any future action in implementation of that merger or control. (FR 22, *et seq.*; CSXT 21, *et seq.*; NS 16, *et seq.*) Union Respondents respectfully submit that the Petitioners' and Federal Respondents' view of section 11341(a) is without merit for

[38] *Ogeechee Railway Co.—Purchase and Trackage Rights—Missouri Pacific Railroad Company, Etc.*, Finance Docket Nos. 31570 and 31571 (July 27, 1990); *Rio Grande Industries, Inc., Et. Al.—Purchase and Related Trackage Rights—Soo Line Railroad Company, Etc.*, 6 I.C.C.2d 854, 894 (July 16, 1990). *See also, Wilmington Terminal Railroad, Inc.—Purchase and Lease—CSX Transportation, Inc. Lines Between Savanna and Rhine, Etc.*, 6 I.C.C.2d 799, 817 (June 20, 1990).

their reading of that provision impermissibly expands the range of carrier actions within its scope and injects the ICC directly into the labor relations of the railroad industry.

A. The Plain Language Of Section 11341(a) And Its History Do Not Support Its Use As A Basis For ICC Labor Relations Authority

It is axiomatic that the "starting point" in any case involving the interpretation of a federal statute is the "language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Where that language is clear, the inquiry into its meaning should cease, for Congress is presumed to have intended what the plain language of its statutes states. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). Moreover, since section 11341(a) is in effect an implied repeal statute, it must not be expanded beyond its literal terms—*i.e.*, it must be construed narrowly. *E.g.*, *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986); *accord*, *Watt v. Alaska*, 451 U.S. 259, 267 (1981). When those principles are applied to section 11341(a), it becomes clear that this immunity provision is not as expansive as Federal Respondents and Petitioners now believe. Moreover, Union Respondents respectfully submit, the Interstate Commerce Act itself, prior decisions by this Court, past ICC practice, the provision's legislative history and, the recent remand decision of the ICC, all demonstrate that section 11341(a)'s exemption authority does not extend to collective bargaining agreements.[39]

While section 11341(a) provides that the ICC's "authority . . . under this subchapter [*i.e.*, Subchapter III of Chapter 113] is exclusive", it is apparent that this exclusive authority extends only to matters over which

[39] Indeed, NS, in its question presented and its argument (NS 16-23), contends section 11341(a) relieves railroads of *all* contracts that impede its carrying out an approved merger.

Congress has given the ICC jurisdiction under the ICA's consolidation procedures.

Section 11343(a) of the ICA, 49 U.S.C. § 11343(a), lists certain railroad transactions that may be undertaken only with the approval and authorization of the Commission. Among those transactions is the consolidation or merger of two or more carriers "into one corporation for the ownership, management and operation of the previously separately owned properties" (section 11343 (a)(1)); the "acquisition of control of at least 2 carriers by a person that is not a carrier" (section 11343(a)(4)); and, the "acquisition of control of a carrier by a person that is not a carrier but controls any number of carriers" (section 11343(a)(5)). Section 11341(a)[40] confers exclusive authority upon the Commission only in matters arising under subchapter III of Chapter 113 and exempts carriers participating in an approved transaction "from the operation . . . of all other . . . law, ... as may be necessary to enable them to carry into effect the transaction so approved or provided for an accordance with the terms and conditions, if any, imposed by the Commission."[41] When the successful railroad applicants become

[40] Section 11341(a) was first enacted as Section 5(8) of the Interstate Commerce Act by Section 407 of the Transportation Act of 1920, 41 Stat. 456, 482. Section 11341(a)'s current wording is the result of the codification of the Interstate Commerce Act which was effected by the Recodification Act of 1978. Pub. L. No. 95-473, 92 Stat. 1337 (1978), which effected no substantive change. *See infra*, n.41.

[41] The language quoted is from section 11341(a) as it appeared in section 5(12) of the Act before recodification. Section 3(a) of the 1978 Recodification Act provides that the restatement of the ICA was made without substantive change and "may not be construed as making a substantive change in the laws replaced." 92 Stat. 1466. According to the recodifiers, the phrase "carry into effect" was changed to "carry out" for clarity and the clause "in accordance with the terms and conditions, if any, imposed by the Commission" was omitted "as unnecessary" because of the restatement. House Report No. 95-1395, 95th Cong., 2d Sess. at 159 (1978); Pub. L. No. 95-473, 92 Stat. 1337, 1434. The authors of the recodification viewed as obvious the statutory requirement that any

one corporation or become the subsidiaries of a parent corporation, they have fully effected the authority which the plain language of subchapter III authorizes the ICC to confer. Section 11347 requires the ICC to protect employees from the results of approved "transactions" when they occur, but there is nothing in the law or its history which would permit the ICC to extend its limited and specified approval authority to *results* of transactions, particularly where such an extension would inject it into labor relations.

In the sixty-three years that passed between the initial enactment of section 11341(a) and the Commission's decision in the *DRGW* case, neither the Commission nor the courts believed that the ICC had any jurisdiction over labor relations matters, much less could override the statutory or agreement rights of employees on the basis of authority conferred by that provision.[42]

One of the first to express an authoritative opinion on ICC jurisdiction over labor relations was Joseph B. Eastman, Federal Coordinator of Transportation and Chairman of the ICC. In 1934, Congress was considering amendments to the Railway Labor Act. Section 2 of a pending bill related to the railroads' collective bargaining duties and contained a provision requiring any U.S. Attorney to prosecute violations of its provisions upon the application of the employees' union representative. Representative Holmes suggested deleting the union as an applicant to seek prosecution and to give that responsibility to the ICC. Mr. Eastman responded:

permissive Commission order had to be carried into effect in accordance with its conditions. Section 11341(a) in its precodified form as section 5(12) is set forth in Appendix E to this brief.

[42] Federal Respondents and Petitioners rely upon only two decisions from that long history. *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), *aff'g* 202 F.Supp. 277 (S.D. Iowa 1962), *cert. denied*, 375 U.S. 819 (1963) and *Norfolk & Western Ry. and New York & St. Louis R.R.—Merger, Etc.*, 347 I.C.C. 506, 511-512 (1974). These cases involved the application of agreements, not their modification or elimination. They are discussed *infra*, 41-42.

> It certainly should not be the Interstate Commerce Commission, because they have no jurisdiction over labor matters at all and never have had.

Hearings on H.R. 7650 Before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. at 54 (1934).

Between 1959 and 1970, many railroad merger and control cases were approved by the Commission in which the unions and managements involved agreed to guarantees of lifetime employment in return for a management right to transfer work and employees throughout the merged system. *See supra*, 13 n.26. Surely, had the railroads thought that section 11341(a) exempted them from the transfer restrictions in their existing agreements they would not have guaranteed their employees lifetime employment to obtain that relief.

After the collapse of the Penn Central and other Northeast railroads, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 986 ("3R Act"), to preserve that rail service. Penn Central had agreed to life-time protection for their employees as had other merging railroads and for the same reasons. During the course of the hearings on the 3R Act, representatives of labor and the managements of other railroads who had formed a committee to negotiate and submit to Congress for its consideration a statutory provision to replace the Penn Central attrition agreement, testified before the Senate Committee on Commerce. The labor witness testified that in reaching agreement with the railroads on this proposed statutory provision, which became section 503 of the 3R Act,[43] labor wished to provide the corporation to be created [now Conrail] "the widest possible latitude . . . in getting . . . underway" by placing in the statute "unprecedented provisions for transfer of employees and work as between all these various preexisting [railroad] corporations".

[43] Section 503 of the 3R Act (45 U.S.C. § 773 (repealed)) is set forth as Appendix F to this brief.

Hearings before the Surface Transportation Subcommittee of the Committee on Commerce, U.S. Senate, on S.2188 and H.R. 9142, 93rd Cong., 1st Sess. at 952-53 (1973). Mr. Graham Claytor, then president of Southern and a management witness, when questioned as to the reason for such expensive protection being accorded employees by the proposed statutory provision,[44] testified that in return for that protection, the railroads involved had been given "the right to trasfer [sic] people within their craft outside of their seniority district"; that "this is terribly important as a practical matter . . . . [w]ork can be transferred freely . . . you may close a shop here and concentrate all the work in another shop there." Mr. Claytor further stated that the freedoms to transfer work and employees "were the principal items that we [the railroads] . . . felt, principal reasons that we felt this agreement made . . . this new corporation [Conrail] a viable thing . . . ." (*Id.* at 972-73.)

Union Respondents respectfully submit that had Mr. Claytor and the other railroads' representatives thought that the Congress had already provided such relief to railroads going before the ICC to obtain merger approval, they would have sought the same relief from Congress for Conrail instead of guaranteeing lifetime protection for Conrail's future employees.

The only attempt at direct use of section 11341(a) to override the statutory and contract rights of employees was made in 1958 by the Chicago and North Western Railway Company ("C&NW") in circumstances remarkably similar to those now before the Court.

The C&NW had leased all lines of the St. Paul, Minneapolis and Omaha Railway Company ("Omaha") as the result of an ICC order. C&NW returned to the ICC complaining that it had tried and failed to obtain agreements with certain of the unions involved which were required before it could carry out the integration of the

[44] The provision became section 505 of the 3R Act, 87 Stat. 1014.

C&NW and Omaha properties under the lease. C&NW asked the ICC to declare (295 I.C.C. 696-697):

> that, in consequence of the exclusive and plenary authority vested in this Commission with respect to the unification of railway carriers, section 6, and related provisions, of the Railway Labor Act are inapplicable and that, in order to enable the parties to carry out the transaction authorized and contemplated by our [I.C.C.] order of December 28, 1956 the parties to this proceeding are expressly relieved of the restraints, limitations and prohibitions of all other laws, including expressly section 6 of the Railway Labor Act; . . .

The Commission held it had no authority to grant C&NW's request because its order approving the lease was permissive as to the carriers and no requirement was made of the employees (*id.* 701); section 5(2)(f) [now § 11347] required certain duties be imposed upon the carriers and did not authorize the ICC to direct the employees or the unions to do anything (*id.*); and, section 5(11) [now section 11341(a)] was self-executing and did not authorize the ICC to declare particular laws superceded by its orders (*id.* 702).[45] Most significantly for the purposes of the history of the application of section 11341(a) are the final two grounds upon which the ICC rejected C&NW's request (*id.*):

> Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction of the National Mediation Board, which, in effect, is what North Western requests us to do.
>
> It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease of North Western of the line of railroad and other properties owned, used, or operated by the Omaha, and this has been accom-

[45] The court of appeals disagreed with the latter part of this particular holding in the Commission's *Omaha* decision. (Pet. App. 21a.)

plished. The order did not provide any particular method for integration of the physical operations involved, and, except for the imposition of the abovementioned conditions for the protection of employees, did not deal with employer-employee relationships.

The next case in which the Commission stated its views on ICC authority over labor relations was *Southern Ry. Co.—Control—Central of Ga. Ry. Co.*, 331 I.C.C. 151 (1967). The Commission had approved the control of the Central of Georgia Railway ("Central") by Southern through a stock purchase in 1962.[46] In imposing the conditions for the protection of employees, the ICC had unintentionally omitted protections requiring a 90-day notice of intended changes affecting employees and the negotiation of implementing agreements.[47] The Southern proceeded to abolish over 1500 jobs of Central employees and transferred their work to Southern (331 I.C.C. 171). The Central employees received no recognition of their contract or RLA rights. In 1964, this Court vacated the judgment entered against the unions by a 3-judge district court and remanded the case to that court with instructions that it be remanded to the ICC and that agency ordered to amend its reports and orders "as necessary to deal with [union] appellants' requests that §§ 4, 5 and 9 be included as protective conditions . . . ."[48]

After extended hearings on remand in which it received testimony from the affected employees, the Commission noted that the railroads made no "attempt to negotiate with the railroad organizations of the two railroads for an agreement authorizing the transfer of work from one railroad to the other in effectuating the consolidations" (331 I.C.C. 171) and concluded that the railroads demonstrated "a callous disregard . . . for the established rights and interests of the employees on the Central of Georgia. . . ." (*Id.* 185.)

[46] *Southern Ry. Co.—Control—Central of Ga. Ry. Co.*, 317 I.C.C. 557 (1962).

[47] Protections similar to those in *New York Dock* conditions, Art. I, Sec. 4.

[48] *Railway Labor Executives' Ass'n v. United States*, 379 U.S. 199 (1964).

In the course of its opinion, the ICC set forth its duty and limitations under the law. These statements require no elaboration (*id.* 169-170) (emphasis in original):

> [W]e impose formulae of protective conditions *upon the carriers* seeking specific permissive authority under section 5(2) [now sections 11343, 11344] of the act, the purpose being *to protect* the interests of employees, some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act.
>
> * * * *
>
> The rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carriers under section 5(2)(f) are independent, separate, and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees.
>
> * * * *
>
> These protective conditions imposed upon carriers under section 5(2)(f) [now 11347] which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their adjustments of the labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect. *Texas & N.O.R. Co. v. Brotherhood of Railroad Trainmen*, (5th Cir., 1962) 307 F.2d 151.

Of equal importance, this contention of applicants is demonstrably erroneous. By its terms, section 5(11) applies only to antitrust and other restraints

> of law from carrying "into effect the transaction so approved . . .". Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed *section 5 transactions have been successfully consummated in full compliance with such terms. Cf., Chicago, St. P., M. & O., Ry. Co., Lease,* 295 I.C.C. 696. . . . [Emphasis supplied.]

The Southern and Central did not appeal from this decision.

Union Respondents respectfully submit that prior to the Commission's decisions in *DRGW*, *Maine Central* and their progeny, there is no support to be found for the notion that anyone believed that section 11341(a) could be interpreted to override the contract rights of employees.

B. The Commission Has No Expertise In Labor Relations

The Commission has repeatedly disavowed any expertise in labor relations. Coordinator Eastman was emphatic in rejecting ICC entry into that arena. *See supra*, 27. The language of sections 11343 and 11341(a) contain no implication that they are intended to involve the ICC in labor relations.

In 1977, the Commission expounded at some length on its lack of expertise in labor relations. *Leavens, et al. v. Burlington Northern, Inc.*, 348 I.C.C. 962, 975, 976 (1977). Even as recently as January 26, 1983,[49] in a case in which a union wanted the ICC to declare a railroad in violation of the Commission-imposed employee protective conditions, the Commission refused, reaffirming its lack of "expertise to place ourselves into the field of collective bargaining for labor management relations." *Brotherhood of Locomotive Engineers v. Chicago and North Western Transportation Company, et al.*, 366 I.C.C. 875, 861 (1983). Also in 1977, the Commission rejected a request from another union to remove a provision in a trackage rights agreement the ICC had approved which specified the crews which would operate the trains over the leased tracks. The Commission held "that as to . . . matters relating to labor relations as may fall within the purview of the Railway Labor Act the [ICC Review Board correctly] declined jurisdiction over such questions." *Illinois Central Gulf R. Co.—Trackage Rights—Chicago and Ill. Midland Ry.*, Finance Docket No. 28046 (February 22, 1977) (not printed).

[49] The *DRGW* case was decided ten months later (October 19, 1983).

While an administrative agency may change its mind regarding the interpretation of the statute it administers so long as it specifies its reasons for doing so, it does not, we respectfully submit, by so changing its mind suddenly acquire an expertise which it had always recognized it did not have.

C. Congress Has Avoided Allowing The ICC Involvement In Labor Matters

Except for its commands requiring the ICC to consider employee interests as part of the public interest and to provide employees with specific minimum protections, the Congress has not given the ICC the right to involve itself in employment matters, least of all labor relations.

Certainly, section 11341(a) cannot be read as a labor relations statute; nor can section 11347, which is a minimum standards type of legislation. *Compare, Fort Halifax Packing Co.*, 482 U.S. 1, 20-22 (1987) *with Terminal R.R. Assoc. v. Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6 (1943). It would be incongruous to conclude that having enacted the Railway Labor Act to govern labor relations procedures in the railroad industry and having often refused to require compulsory arbitration of major disputes in that industry,[50] Congress would require compulsory arbitration of major disputes by implication under the jurisdiction of an agency that has repeatedly held itself out as having no expertise in labor

[50] Section 7 First of the RLA, 45 U.S.C. § 157 First, prohibits compulsory arbitration of major disputes.

relations. It is simply wrong to read section 11347, a minimum standards provision designed to *protect* employee interests, as effecting *sub silentio* such a major change in rail labor relations—*i.e.*, the implied repeal of Section 7 First of the RLA.

Other than the provisions which require protection of the interests of employees who might be affected by ICC orders, the Interstate Commerce Act refers to employees in only two other respects: in section 11344 the "interest of carrier employees affected" is listed as one of the elements of the public interest which the Commission must consider in passing upon one or more of the transactions listed in section 11343(a) and, in section 10101 (a), encouragement of "fair wages and safe and suitable working conditions in the railroad industry" is listed as one of fifteen stated objectives of the United States in regulating the railroad industry.[51] Neither of these provisions gives to the ICC any authority over labor relations.

The Congress, however, has allowed the Commission to affect labor relations in a tangential and most limited way in two provisions contained, not in the Interstate Commerce Act but, in the Railway Labor Act. In section 1 First of the RLA, 45 U.S.C. § 151 First, the ICC, upon request of the National Mediation Board or upon complaint of an interested party, is to determine whether an electric powered railroad is a "carrier" within the meaning of that term as defined in section 1 First; and, in order to determine who would be considered an "employee" or "subordinate official" and thereby subject to the RLA, the Congress authorized the ICC to make that determination based upon the type of work performed by the person involved. However, in providing that authority in section 1 Fifth (45 U.S.C. § 151 Fifth), Congress very carefully circumscribed the ICC's role:

> *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

[51] *See, United States v. Lowden*, 308 U.S. 225, 332-38 (1939).

Those are the only statutory provisions in the U.S. Code which could be viewed as allowing the Commission to have even the most peripheral effect on railroad labor relations.

The legislative history of the rail consolidation provisions of the Interstate Commerce Act also demonstrates Congress' refusal to extend to the ICC jurisdiction over labor relations matters. Railroads have been subject to federal regulation as an industry for over 100 years (*see*, Act of February 4, 1887, 24 Stat. 379), and during virtually that same period, Congress has also regulated rail labor relations. *E.g.*, Arbitration Act of 1888, 25 Stat. 501. Rail regulation by the ICC became more extensive after the railroads were returned to private ownership by the Transportation Act of 1920, 41 Stat. 456, but Congress has never given the ICC control over labor relations matters, even though such control has been proposed on several occasions. *E.g.*, Testimony of Federal Coordinator Eastman, *supra*; S. Rpt. No. 459, 88th Cong., 1st Sess. at 9 (1963) to accompany S.J. Res. 102, Pub. L. 88-108; 77 Stat. 129.[52]

Although Congress has long recognized that stable labor relations are essential to an efficient national rail transportation system and that there is an overlap between this goal and sound financial regulation by the ICC (*e.g.*, *United States v. Lowden*, 308 U.S. 225, 235-36

[52] In that report, the Senate, and later the Congress, rejected the use of the ICC as the body to investigate and report on a long-time "crew consist" dispute, involving the continued use of firemen on locomotives, by stating (S. Rpt. No. 459 at 9): "[N]either the Interstate Commerce Commission or the other regulatory agencies other than the National Labor Relations Board, which are, in fact, arms of Congress, are designed or intended to serve as a repository for labor disputes. This Committee has no desire to see a change made in this respect."

(1939)), Congress has nevertheless treated the two forms of regulation separately. For example, while Title IV of the Transportation Act of 1920 made extensive amendments to the Interstate Commerce Act, including adding for the first time the predecessor of what is now Section 11341(a), Title III of that Act created the Labor Board to investigate and to report on rail labor disputes; it provided for voluntary adjustment boards to consider minor disputes; and, it required both rail labor and management to exert every reasonable effort to avoid any interruption to the operation of any carrier. 41 Stat. at 469. There is no indication in the Transportation Act of 1920 that Congress also intended to give the ICC any jurisdiction over labor relations matters to the exclusion of the Labor Board or adjustment boards, when it first enacted in Title IV of that Act what is now Section 11341(a). Indeed, by placing the two forms of regulation in separate titles, it must be presumed that the ICC's exclusive authority over consolidations did not include jurisdiction over labor relations matters.

The discrete nature of the two forms of regulation is borne out by the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, ("ERTA"). Congress reenacted in Section 202 of that Act what is now Section 11341(a) as part of its grant of jurisdiction to the ICC over railroad consolidations. *See, Texas v. United States*, 292 U.S. 522, 534-35 (1934). That Act also created the office of the Federal Coordinator of Transportation who was given the specific authority "to encourage and promote or *require* action" on the part of railroads to "avoid unnecessary duplication of services and facilities . . . [and] avoid other wastes and preventable expense . . . ." Section 4 of ERTA, 48 Stat. at 212 (emphasis added). Congress also gave orders of the Coordinator an immunity similar to that it had reenacted for ICC consolidation orders, but, because his orders were mandatory, it specifically limited that immunity in several respects. First, laws "for the protection of the public health or safety" were not to be waived; and, as relevant here: "[N]othing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." Section 10(a), ERTA, 48 Stat. at 215; *see also*, Section 10(b), 48 Stat. at 215.

The Federal Respondents and the Petitioners rely heavily upon the 1936 expiration of Title I of the Emergency Transportation Act of 1933 which contained a provision similar to section 11341(a), but with the specific prohibition against the elimination or modification of employees' RLA and contract rights in any order of the Federal Railroad Coordinator compelling specific economies to be undertaken by railroads. (FR, 32-33; NS, 27-29; CSXT, 39-43.) They argue that because Congress permitted Title I to expire and did not amend the section 11341(a)-type provision in Title II to include the specific prohibition against elimination or modification of employees' rights, Congress intended to include the statutory and contract rights of employees within the exemptive authority conferred by section 11341(a). (*Id.*)

Reliance on such an argument is misplaced for it fails to take into account the broader jurisdiction which the Coordinator had, as compared with that given to the ICC. As this Court has stated before:

> From the initial enactment in the Transportation Act of 1920 . . ., to the most recent comprehensive reexamination of these provisions in the Transportation Act of 1940 . . ., Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad . . . . The role of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged.

St. Joe Paper Co. v. Atlantic Coast Line R.R., 347 U.S. 298, 305 (1954). Moreover, in passing on the validity of a consolidation transaction proposed by the railroads, the

Commission's jurisdiction is limited to the financial transactions specified in Section 11343(a). The Coordinator's jurisdiction, however, ran to all matters which could permit railroads to operate more economically and he had explicit authority to *require* carriers to take certain actions.

Congress recognized that the Coordinator's broader jurisdiction could cover labor relations matters and it provided certain protections for employees, including advance notice of orders which will affect the interests of employees (Section 7(a)); a prohibition on reductions in numbers of jobs by reason of any action taken pursuant to the authority of the Coordinator (Section 7(b)); a guarantee against individual employees being deprived of employment or placed in a worse position with respect to compensation by reason of any action taken pursuant to authority of the Coordinator (*id.*), and, a specific recognition that the Coordinator's orders did not supersede the Railway Labor Act (Section 10(a)). A comparable limitation on the scope of what is now Section 11341(a)'s immunity as not affecting Railway Labor Act rights was not necessary for the simple reason that Congress in the separate Title devoted to the ICC, had not even arguably given the ICC jurisdiction over labor relations matters.

Moreover, section 11341(a) and its predecessors were never utilized by the Commission to override the statutory and contractual rights of employees until the Commission issued its decisions in *DRGW* and *Maine Central, supra.*[53] And, even assuming that there was some ambiguity in the reach of Section 11341(a) prior to 1976, that ambiguity was eliminated when Congress amended section 11347[54] (then section 5(2)(f)) to direct the Commission

[53] The four attempts to do so prior to the Commission's 1983 *DRGW* decision were rejected. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.—Lease, supra*, 295 I.C.C. 696 (1958); the three arbitration decisions referred to by the ICC in its remand decision at 6 I.C.C.2d 746 were not appealed by the railroad involved (N&W) to the Commission or the courts.

[54] 4R Act, Section 402(a), 90 Stat. 31, 62.

to condition its orders of approval upon terms requiring the carriers to preserve all existing statutory and contract rights of the employees involved should they decide to carry out the permissive authority granted. *See, infra*, 45-47.

Petitioners and Federal Respondents (FR 35-38; NS 29-33; CSXT 43-46) refer to the passage of what was then section 5(2)(f) during Congress' consideration of the Transportation Act of 1940 and argue that Congress' "rejection" of the Harrington Amendment[55] shows that Congress intended to allow carriers to implement consolidations irrespective of the fact that the ICC's approval might result in the unilateral alteration of working conditions "as long as those employees were compensated and otherwise fairly protected under the Commission's labor protective conditions." (FR 38.) Those assertions are without merit for the Transportation Act of 1940 required the ICC to consider as part of its public interest determination the impact of the proposed transaction on employees and to impose a fair and equitable arrangement "*to protect* the interests of the railroad employees affected" by the transaction. Section 7 of the Transportation Act of 1940, 54 Stat. 899, 906-07, adding 49 U.S.C. § 5(2)(b) (emphasis added). It did not authorize or intend the abrogation of employee rights.

The concept of protecting employee interests was not new in 1940, for the Commission had recognized since 1934 that the impact of a transaction on employees was

[55] Representative Harrington proposed that the Commission could not approve a transaction "if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9882 (1939). Rep. Harrington's original amendment was not "rejected", but was eventually modified and incorporated as the second sentence of section 5(2)(f) which required that the protective arrangement to be imposed must provide at the minimum that affected employees receive at least a four year guarantee against being placed in a worse position with respect to compensation. *See, Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169, 174 (1961).

an integral part of the public interest to be considered in deciding whether to approve a transaction (*St. Paul Bridge & Terminal Ry.—Control*, 199 I.C.C. 588, 596 (1934)), and for several years prior to 1940, it had been imposing an arrangement to protect employee interests as a condition of its consolidation approvals. *See, United States v. Lowden, supra.* Employee interests were considered and protected, not because employee protection was the price to be paid to allow a rail carrier to change rates of pay, rules or working conditions, but rather, because Congress had determined that it was not in the public's interest for rail employees to be the primary providers of the economic benefits which consolidations could achieve for railroads. *ICC v. Railway Labor Executives' Assoc.*, 315 U.S. 373, 377-79 (1942); *United States v. Lowden, supra*, 308 U.S. at 235-36. Requiring the ICC to consider and to protect the interests of employees is far different from allowing the Commission to authorize new rates of pay, rules, or working conditions, for the former is directed to the parties seeking ICC approval of a consolidation transaction—*i.e.*, the carriers—whereas the latter requires the ICC to direct rail labor to take certain action. As the ICC has said before:

> [U]nder section 5 of the Act [now § 11341, *et seq.*] we merely authorize or permit the applicant carriers to enter into a proposed transaction. We may not even compel the carriers to consummate an authorized transaction. . . .
>
> Under section 5(2)(f) of the Act, we are "required" to impose upon the carriers in each approved transaction conditions for the protection of railroad employees affected. But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything . . . .

Chicago, St. Paul, Minneapolis & Omaha Ry.-Lease, supra, 295 I.C.C. at 701. Congress, Union Respondents respectfully submit, intended labor relations matters arising from a consolidation to be resolved by the procedures of the Railway Labor Act. *See generally, Air Line Pilots Assoc. v. CAB*, 667 F.2d 181 (D.C. Cir. 1981); *Delta Air Lines, Inc. v. CAB*, 543 F.2d 247, 260 (D.C. Cir 1976) (Civil Aeronautics Board's jurisdiction over airlines does not extend to safety matters which are subject to jurisdiction of Federal Aviation Administration).

Union Respondents' position that the ICC does not have jurisdiction over labor relations matters is supported by the ICC's treatment of the supposed conflict between the Interstate Commerce Act and the Railway Labor Act prior to 1983. *See, supra*, 27-32. Union Respondents' position as to the limited nature of the ICC's exclusive jurisdiction under Section 11341(a) is supported by the Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra*, in which the railroads sought to enjoin a strike by rail labor over the carriers' refusal to negotiate under the Railway Labor Act changes in working conditions resulting from an ICC approved consolidation transaction. 307 F.2d at 158. As the Fifth Circuit observed, the railroads included in their application to the ICC "such detail . . . as to determine the major provisions of a new labor contract [to govern the new operations], although at no time were the unions brought into the negotiation of these agreements." *Id.*:

> The appellants then argue that ICC approval of the agreements makes them binding on the unions. If so, not only does section 5 give the Commission power to approve a section 5(2) transaction, but it gives the carriers the right to legislate the terms of a continuing contract with a third party, although a different contract more favorable to the third party might have been equally acceptable to the Commission. We do not feel the statute may be so interpreted.

A contrary result was reached at about the same time in *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) upon which Petitioners and Federal Respondents rely. But the fact that the *BLE* case would create a conflict between the ICA and the RLA schemes of regulation and the *T&NO* case accommodates those schemes without conflict; and, the fact that

in *BLE* there was no conflict for the union was bound by a voluntary agreement to arbitrate, substantially lessen *BLE*'s value to Petitioners and Federal Respondents.

The only pre-1983 statement of the ICC relied upon by Petitioners and Federal Respondents is *Norfolk & W. Ry. Merger*, 347 I.C.C. 506, 511-12 (1974), in which the Erie-Lackawanna Railroad had been included in the N&W merger and had signed an employee protection agreement which its court-appointed Trustee wished to have rescinded. Labor argued, *inter alia*, that the ICC had no authority to rescind the agreement. The ICC said in the course of its opinion that it could do so under section 5(11), but it did not and required the Trustee to abide by the agreement. The decision was not appealed.[56]

In the 102 years that Congress has regulated rail labor relations, it has refused to compel the arbitration of major disputes, except in a few special cases where the bargaining process had been exhausted without agreement. *E.g.*, *supra*, n.52. Indeed, Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First provides: "That the failure or refusal of either party to submit a controversy [over rates of pay, rules, or working conditions] to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act *or otherwise*." (Emphasis added.) Also, Congress has concluded that in order to encourage compromise, neither rail management nor labor can change the status quo during the negotiation and mediation phases of the compulsory bargaining. 45 U.S.C. §§ 152, Seventh, 155 First and 156. This Court has held those status quo requirements to be central to the design of tnis labor statute. *Detroit & Toledo Shore Line R. v. UTU*, 396 U.S. 142, 150 (1969). As this Court has explained:

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned, these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce . . . .

[56] Neither *BLE* nor *N&W Merger* overrode contracts and prior to 1983, neither case had been relied upon by the ICC to support an order overriding a contract.

Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen, *supra* at 6 (1943) (footnote omitted).

Whether judged by Section 11341(a) or by general conflict of laws principles, it is clear that the ICC has no authority in labor matters and that separate schemes in regulating railroad transportation under the Interstate Commerce Act and the Railway Labor Act do not conflict, for the goals of both Acts are compatible.[57] As this Court has stated before, repeals by implications "are not favored" (*e.g.*, *Morton v. Mancari*, 417 U.S. 535, 549 (1974)) and will not be found to exist unless the intention of the legislature to repeal is clear and manifest. *Watt v. Alaska*, *supra*, 451 U.S. at 267. Indeed, federal courts "must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Id.* Here, Federal Respondents and Petitioners have made no attempt to read the Interstate Commerce Act's consolidation provisions together with the commands of the Railway Labor Act, but the fact that

[57] Congress' refusal to vest the ICC with labor relations authority renders *Schwabacher v. United States*, *supra* inapposite here because *Schwabacher* held state law was pre-empted where Congress had given the ICC "complete" control of the subject matter. There, the ICC had "complete control of the capital structures to result from a merger," 334 U.S. at 191-92, 195, by virtue of 49 U.S.C. §§ 11301 and 11343. Neither those nor any ICA provision give ICC control over labor matters.

the two Acts have existed side-by-side without a conflict for more than fifty years prior to the Commission's 1983 shift in its policy toward employee rights, as acknowledged by ICC (*supra*, 12) demonstrates that the two Acts can be read so as to give effect to each.

Imposed arbitrated changes, such as those which occurred in the arbitration awards in these cases, are contrary to the Railway Labor Act. More important, they have brought with them, as recognized by the ICC, *supra*, 12, a deterioration of labor-management relations; a "loss of employee morale when the demands of justice are ignored." *United States v. Lowden, supra*, 308 U.S. at 236. These results are contrary to the goals of the Interstate Commerce Act. *See, ICC v. Railway Labor Executives' Assoc., supra*, 315 U.S. at 377. As this Court has explained:

> The Commission acts in a most delicate area here [*i.e.*, a strike situation where it was asked to certify a replacement motor carrier], because whatever it does affirmatively . . . may have important consequences upon the collective bargaining processes between the union and the employer. The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other

Burlington Truck Lines, Inc. v. United States, supra, 371 U.S. at 172-73. Unfortunately, by concentrating solely on the speedy implementation of all aspects of an approved transaction, no matter when they occur after the transaction itself has been consummated, and by ignoring the limits of its jurisdiction, the ICC has made no attempt to accommodate the policies of the two statutes. It has simply ruled that employee contract and statutory rights must give way to its orders because "its order and not the RLA or . . . [employee contracts] govern employee-management relations in connection with the approved transaction." *Maine Central, supra.*

D. Section 11347, Particularly As Amended In 1976, Prohibits The ICC From Modifying Or Eliminating Employees' Contract And Statutory Rights

As demonstrated above, prior to 1983 the Commission, the railroads, the unions and the Congress considered the ICC to have no authority over the modification or elimination of the contract or statutory rights of employees. However, if such an issue had existed it would have been laid to rest by the 1976 amendments to the Act.

As this Court has recognized, the 4R Act and the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, "aimed at reversing the rail industry's decline through deregulatory efforts, above all by streamlining procedures to effectuate economically efficient transactions." *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Association*, 491 U.S. ——, (1989), slip op. at 8. Yet, as the Congress progressively loosened the bonds of regulation on the railroads in each of these statutes, it added and *increased* protections to be afforded the railroad employees that might be affected thereby.

In its first step toward deregulation, the 4R Act, Congress increased the compensatory protections as well as the length of the protective period (from 4 to 6 years) for employees affected in consolidation cases and explicitly required the Commission to impose the same protections for railroad employees affected by consolidations as it had required the Secretary of Labor to establish for the protection of railroad and other employees affected by the Rail Passenger Service Act of 1970, 45 U.S.C. § 501, *et seq.*, in section 405(b) of that act, 45 U.S.C. § 565(b).[58] The 1976 amendment to section 11347 did not stir opposition from the railroads or the unions precisely because they recognized its plain language as a confirmation of existing law that the ICC had no juris-

[58] 4R Act, section 402(a), 90 Stat. 62. In relieving the railroads of many of the burdens associated with the abandonment of railroad lines, Congress also increased employee protection to the level of that provided them in section 402 and made that protection mandatory. 4R Act § 802, 90 Stat. 127-28 [now 49 U.S.C. 10903].

diction over the contractual and statutory rights of employees. There is virtually no legislative history of section 402(a) of the 4R Act which amended section 11347. Perhaps Congress wished to be certain no one could interpret the beginning of its deregulation of railroad obligations as lessening or affecting in any way the railroads' obligations to their employees; or, perhaps, because by that amendment Congress for the first time was expressly requiring the imposition of the notice, negotiation and arbitration provisions of WJPA, it wanted to be certain that no one could interpret that requirement as providing the ICC with authority to affect the contract or statutory rights of employees. Whatever Congress' reasons, its plain language is unmistakable in directing the Commission to ensure preservation of those rights.[59]

In effecting its completion of railroad deregulation by enacting the Staggers Rail Act, Congress did not affect the increased protections it had afforded the employees in the 4R Act, but, in those provisions in which it relieved railroads of specific ICC regulation, it inserted specific mandatory or discretionary protection for employees who might be affected by those provisions.[60]

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[59] Neither the Federal Respondents, the ICC individually nor the Petitioners confront the equally explicit language of section 3 of the *New York Dock* conditions which prohibits deprivation of employee rights under protective agreements such as the "Orange Book". *See* Appendix D.

[60] Section 213 (49 U.S.C. § 10505) (relief from all ICA requirements and ICC regulations except (1) employee protection and (2) prohibited intermodal ownership); Section 219 (49 U.S.C. § 10706) (lessened need for rate bureaus but require section 11347 employee protection); Section 221 (49 U.S.C. § 10901) (construction of rail lines, discretionary protection equal to section 11347); Section 223 (49 U.S.C. § 11103) (reciprocal switching agreement discretionary employee protection); Section 226 (49 U.S.C. § 11123) (limitations on issuance of car service orders, required hiring of employees who had performed that work); Section 227 (11 U.S.C. § 1170) (bankruptcy courts bound by section 11347); Section 228 (liberalized merger provisions but left section 11347 untouched); Section 401 (49 U.S.C. § 10910 (sales of lines to "financially responsible" persons for "feeder line" development, required use of

Union Respondents respectfully submit that the extreme and deliberate care demonstrated by the Congress to ensure the protection of employee interests in these statutes demonstrates an emphatic rejection by Congress of any notion that section 11341(a) could be considered as allowing the elimination of any statutory or contract rights of railroad employees; indeed, section 11341(a) exempts carriers from laws that would prevent a transaction from being carried out *as conditioned* (*see supra*, 25) and, section 11347, expressly requires any transaction subject to section 11341(a)'s provisions to be conditioned upon the preservation of employees' statutory rights.

Union Respondents respectfully submit, it is illogical to conclude that conditions required by Congress to be imposed by an ICC order could be considered as in conflict with the very order to which they are required to be attached.

III. AN INTERPRETATION OF SECTION 11341(a) AS RELIEVING A RAIL CARRIER OF ITS OBLIGATIONS TO EMPLOYEES UNDER ITS COLLECTIVE BARGAINING AGREEMENTS, WOULD BE CONTRARY TO THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Another and more fundamental problem is presented by Petitioners' and Federal Respondents' position regarding the reach of Section 11341(a). If their view of Section 11341(a) is adopted, that statute would deprive third parties (who happen to be parties to a contract with an applicant railroad) of contractual rights without due process of law, and without just compensation, in contravention of the Due Process and Just Compensation clauses of the Fifth Amendment. U.S. CONST. amend. V. Since it is possible, as the court of appeals concluded, to read Section 11341(a) in such a manner as to avoid these

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employees who "normally" would have performed the work); Section 402 (49 U.S.C. §§ 10903, 10904) (liberalized abandonment provisions but required section 11347 protection).

Fifth Amendment problems, this Court should not accept Petitioners' and Federal Respondents' constitutionally infirm construction of that statute. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974).

These consolidated cases, Union Respondents respectfully submit, are excellent examples of the Fifth Amendment pitfalls into which the railroads would take the ICC by their construction of Section 11341(a). Here, both the ATDA and BRC are parties to contracts with their respective railroads which provide that the work which the railroads transferred shall be performed by employees employed by those railroads and subject to those agreements. Additionally, the BRC's agreement with CSXT, the Orange Book, goes further and provides that CSXT has agreed not to transfer protected BRC employees or their work beyond the former SAL-ACL systems, and it made those commitments in exchange for the right, which it has since exercised, to transfer work and employees within the combined former SAL and ACL systems.

Both agreements confer property rights which are protected by the Fifth Amendment. *E.g., Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260 (1987); *Lynch v. United States*, 292 U.S. 571, 579 (1934). While Congress may exercise its Commerce Clause powers in such a manner that contracts, which were valid when made, are no longer enforceable (*e.g., Louisville & Nashville R. v. Mottley*, 219 U.S. 467, 480 (1911)), it is also clear that Congress' Commerce Clause powers are limited by the protections afforded by the Fifth Amendment's Due Process and Just Compensation protections. *E.g., Wilson v. New*, 243 U.S. 332 (1917). In other words, Congress may make a contract unenforceable, but that action is far different from *relieving* one party of its contractual obligation to the other contracting party, as Petitioners and Federal Respondents argue has occurred here.

The Fifth Amendment's Due Process guarantees, rail labor submits, prohibits Section 11341(a) from being

used to relieve a railroad of its contractual obligations to a third party, such as its employees, which does not have an equal voice in deciding whether to accept or to reject the ICC's permissive regulatory approval.[61] Indeed, the fundamental unfairness in such a use of the ICA's regulatory scheme is self-evident here, where the carriers are attempting to use ICC approvals to override contracts years after those agreements were executed and the consideration has been accepted and utilized by the railroads.

Also, the Fifth Amendment's provision that "private property [shall not] be taken for public use without just compensation" prohibits Section 11341(a) from being interpreted so as to deprive the protected BRC employees of their Orange Book guarantees. Those guarantees were purchased by contract concessions long-ago accepted by CSXT's predecessors, and now CSXT is attempting to use Section 11341(a) to be relieved of its obligations to pay the protected employees their part of the bargain. Under such an interpretation, the ICC's order would have the effect of confiscating the protected employees' property rights. *See, United States v. Larionoff*, 431 U.S. 864, 879 (1977). Such a taking, we submit, would be without just compensation, for no "reasonable, certain and adequate provision for obtaining compensation" is provided. *Cherokee Nation v. Southern Kansas R.*, 135 U.S. 641, 659 (1890). The *New York Dock* conditions, may protect an employee's compensation but, because they are premised on the assumption that contract rights will be preserved, do not compensate employees for lost *contract* rights. Moreover, the *New York Dock* conditions contain no protections from loss of Orange Book prohibitions against transfer of work and employees.

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[61] *See, Regents of The University System of Georgia v. Carroll*, 338 U.S. 586, 600 (1950) "The [FCC] . . . may impose on an applicant [for a license renewal] conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant."

Petitioners' and Federal Respondents' construction of Section 11341(a), would have far reaching, and, we submit, unconstitutional implications, because, as NS acknowledges (NS 21-22 n.24), no contract between an applicant railroad or motor carrier and a third party, such as a bank, a supplier, or union, would be free from the possibility of being abrogated if the applicant subsequently were to conclude that it could operate more efficiently without complying with that contract. *See*, R. A. Allen, *Railroad Line Sales*, 57 Transp. Pract. J. 255, 278-79 (1990). The ICA, including Section 11341(a), has never been read before to have such a destructive effect on contractual obligations (*e.g.*, *Central New England Ry. v. Boston & Albany R.*, 279 U.S. 415, 419 (1929) (construing what is now § 10903)), and no reason has been shown, we submit, why it should suddenly have such an effect seventy years after Congress first regulated rail mergers and consolidations.

CONCLUSION

For the reasons set forth herein, Union Respondents respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Statutes And Constitutional Provision Relied Upon

I. Fifth Amendment to the Constitution of the United States

II. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

- A. Section 11343(a), 49 U.S.C. § 11343(a)
- B. Section 11344(b) and (c), 49 U.S.C. § 11344 (b) and (c)
- C. Section 11347, 49 U.S.C. § 11347

III. Rail Passenger Service Act, 45 U.S.C. § 501, *et seq.*

- A. Section 405(a) and (b), 45 U.S.C. § 565(a) and (b)

I. Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. Interstate Commerce Act, 49 U.S.C. § 10101, et seq. (Relevant Excerpts)

A. Section 11343(a), 49 U.S.C. § 11343(a)

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III or chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the property or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

B. Section 11344(b) and (c), 49 U.S.C. § 11344(b) and (c)

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result form the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse affect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

C. Section 11347, 49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

III. Rail Passenger Service Act, 45 U.S.C. § 501, et seq. (Relevant Excerpt)

A. Section 405(a) and (b), 45 U.S.C. § 565(a) and (b)

(a) A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by a discontinuance of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 305 and 402 of this Act pursuant to any modification or termination thereof or an assumption of operations by the Corporation.

(b) Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting indiivdual employees against a worsening of their positions with respect to their employment which shall in no

event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401 (a)(1) of this Act between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

APPENDIX B

New York Dock Conditions (Relevant Excerpts)

1(a)—"Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

* * * *

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements: *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement

4. *Notice and agreement or decision.*—(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

APPENDIX C

Washington Job Protection Agreement of 1936

(Relevant Excerpts)

*   *   *   *

Section 4. Each carrier contemplating a coordination shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employes of each such carrier and by sending registered mail notice to the representatives of such interested employes. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employes of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.

Section 5. Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

Excerpts From Washington Job Protection Agreement Journal of Negotiations

*   *   *   *

WASHINGTON, D.C., MAY 13, 1936

Meeting was held with the Labor Executives in Room 1030, Transportation Building, Washington, D.C. at 11:00 A.M.

PRESENT:

Messrs.

A. A. Enochs
H. A. Benton
G. E. Bruch
C. A. Clements
E. J. Connors
C. M. Dukes
J. B. Parrish
Jno. G. Walber
William White

E. M. Davis
G. W. Knight
C. C. Handy
J. M. Souby
Ed. Murrin

H. E. Jones
M. L. Long

Labor Executives:

Messrs.

G. M. Harrison—Brotherhood of Railway & Steamship Clerks

W. D. Johnson—Order of Railway Conductors

S. R. Harvey—Brotherhood of Railroad Trainmen

Mr. Burke—Brotherhood of Locomotive Engineers

D. B. Robertson—Brotherhood of Locomotive Firemen & Enginemen

T. C. Cashen—Switchmen's Union of North America

F. H. Fljozdal—Brotherhood of Maintenance of Way Employees

A. E. Lyon—Brotherhood Railroad Signalmen of America

B. M. Jewell—Railway Employees' Department, A. F. of L.

J. G. Luhrsen—American Train Dispatchers' Association

Roy Horn—International Brotherhood of Blacksmiths, etc.

Mr. Obie—Order of Sleeping Car Conductors

Donald R. Richberg—Counsel

Mr. Harrison referred to the last conference at which the Joint Conference Committee went over the draft of agreement etc. Mr. Harrison replied that the agreement did not include these services; it applied only to employees covered by agreements and is co-extensive with the schedule agreements.

Section 3. Mr. Enochs stated the conference committee objects to the last clause dealing with corporate organizations, the effect being to bring under the agreement actions of a single carrier. It was also suggested that this subject should be left to the discretion of the Interstate Commerce Commission. Mr. Robertson voiced the opinion that this paragraph was designed to cover cases where two carriers are listed in the agreement each as single carriers but some time later are consolidated by authority of the Interstate Commerce Commission into

one carrier. In such cases it was the thought of the labor executives that the agreement would protect the employees. There was a disagreement between Mr. Robertson and Mr. Harrison on this point. Mr. Harrison explained that the purpose of the clause was that if a single carrier, party to the agreement later unifies their corporate organizations by authority of the Interstate Commerce Commission which resulted in a change in operations, then the agreement would apply, even though the carrier is listed as a single carrier, party to the agreement. He cited as illustrative the Santa Fe and Santa Fe of Texas; the Rock Island and Rock Island and Gulf; Frisco and Frisco of Texas.

* * * *

Section 4—No disagreement.

Section 5. Mr. Enochs stated this should be rephrased using part of the proposals of the labor executives and of the conference committee. A clause should also be inserted providing for settling a dispute in case of failure to agree. Mr. Harrison stated there was no objection to this and they proposed rewriting their Section 13 to cover this matter. It was suggested that a time limit be fixed within which agreement must be reached so that the dispute can be forwarded for settlement. Mr. Harrison explained that they had thought a 30-day limit from the time a dispute arises. Question was raised whether the agreement referred to in this paragraph must be in accordance with seniority rules and practices in effect on the home roads and Mr. Harrison replied that no change in seniority rules or practices on the roads can be brought about by this agreement; that the management and the committees on the roads are the only parties who can modify the schedules. He stated that the assignments must be made in accordance with the rules and practices existing on the home roads but the allotments of employees would be in accordance with the agreement reached.

* * * *

It was suggested that the words "accepted as appropriate" be used instead of "recognized as appropriate" in the first sentence of conference committee proposed Section 5.

At 12:45 P.M. recess was taken util 2:15 P.M.

APPENDIX D

Washington Job Protection Agreement of 1936

Docket No. 141

(Relevant Excerpts)

Decision by Referee Bernstein

Parties to the Dispute

American Railway Supervisors Association
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen & Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees
Brotherhood Railway Carmen of America
Brotherhood of Sleeping Car Porters
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
Railroad Yardmasters of America
Sheet Metal Workers' International Association
Switchmen's Union of North America
Transportation Communication Employees Union

and

Southern Railway System and
Central of Georgia Railway Company

* * * *

The major questions presented are:

(1) Were the job changes complained of the result of "coordinations" within the meaning of Section 2 of the Washington Agreement?

(2) Do Sections 5(2)(f) and 5(11) of the Interstate Commerce Act, and the employee protective conditions

issued pursuant to the former, extinguish the applicability of the Washington Agreement, to which both Carriers are signatories, so that (3) the Carriers were relieved of their obligations to give notice to the Organizations of the intended alleged coordination and to negotiate implementing agreements before the coordinations could be put into effect?

* * * *

(b) *The applicability of the Washington Agreement*—

Acting under Section 5(2) of the Interstate Commerce Act,[1] the ICC approved the Southern's acquisition of control of Central on condition that certain employee protective conditions, in substance the New Orleans Conditions, be afforded affected employees. These conditions apply the "Oklahoma Conditions" which although patterned after the Washington Agreement, differ from it in several major respects—the guarantee to employees deprived of employment is 100% of test period average earnings rather than 60% and the maximum duration of protec-

[1] It provides:

As a condition of its approval, under this paragraph (2) of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers, prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

tion is four years rather than five—and a few minor ones; moreover, where the Washington Agreement would yield more "compensation," an employee is entitled to receive it. This pattern derives from the *New Orleans Union Passenger Terminal Case*, 282 ICC 271. In its first decision in that case (267 ICC 763) the Commission imposed protective conditions which would have expired four years from the effective date of its order, interpreting Section 5(2)(f) as imposing such duration as a maximum. However, the construction of the terminal was to take most of that period, thereby rendering the "protection" practically meaningless. The Supreme Court held that the four year period specified in Section (5)(2)(f) was not a maximum but a minimum and remanded the case to the Commission. In turn the Commission added the Washington Agreement compensation terms to those of the Oklahoma Conditions so as to extend the protection for a longer period. So, when the Commission has imposed the New Orleans Conditions up to the time of this case it has included the Washington Agreement specifically, making express mention, however, of only the monetary protections.

At issue is whether the non-monetary procedural aspects of the Washington Agreement must be observed when railroads affect coordinations after their corporate affiliation is authorized by the ICC and the Commission prescribes conditions for the protection of employees. Section 4 of the Washington Agreement requires advance notice of an intended coordination and Section 5 of the Agreement requires an agreement between carrier and union before a coordination may be put into effect. Dockets Numbered 70 and 57.

The Washington Agreement came into being in May 1936; Section 5(2)(f) dates from September 1940. The history and purpose of each must be understood in order to determine their interrelation.

As noted in Docket No. 106, in the railroad industry the recognition and scope provisions of rules agreements

commonly are regarded as defining jurisdiction and job "ownership" which prohibit the transfer of work from employees under one agreement to employees—even in the same craft—under another rules agreement. As a result, combining the work of employees of two carriers or shifting work from the employees of one carrier to those of another, the most common means of effectuating coordinations, could not be accomplished without incurring penalty payments to those employees who lost the work. As the savings to be achieved by reducing employment by the combination and rationalization of work of two or more carriers is a major purpose of railroad mergers and acquisitions, a means to overcome the barrier imposed by the rules agreements was necessary. The Washington Agreement serves that purpose—it permits such combinations and transfers of work under specified conditions—including notices of intended coordination, negotiated implementing arrangements, guarantees for employees whose earnings or employment are adversely affected and other benefits. The Agreement—although concluded under the threat of legislation unwelcome to both railroad management and organized labor—was a voluntary private collective agreement entered into by the major railroads and railroad labor organizations to enable the carriers to achieve mergers and to cushion their impact upon employees. Since 1936 many railroads have acceded to the Agreement so that its scope among carriers now is almost universal, although some few unions representing railroad employees are not signatories.

Section 5(2)(f), enacted in 1940, directs the Interstate Commerce Commission to impose conditions for the protection of employees in merger and other cases. In intent and practice those conditions are much like those of the Washington Agreement. The labor organizations declared at the hearings on the measure that they sought to achieve similar employee protections on railroads which then did not subscribe to the Washington Agreement. Other provisions of the 1940 Act relieved the carriers of the threat of mandatory mergers hanging over their heads from

earlier Transportation Acts. In the period preceding enactment in 1940 there was no recalcitrance by railroad labor organizations which arguably required any limitation upon their rules agreements and the job ownership they often were taken to imply; no one contended that the Washington Agreement was inadequate to its tasks. Nothing in the legislative history of Sections 5(2)(f) or 5(11) was presented which even remotely shows an intention by Congress, or anyone else, to abrogate the rules arrangements, including their merger-barring effect and the Washington Agreement's machinery for overcoming them. Indeed, as noted below, the legislation specifically recognizes the desirability and validity of such private arrangements.

Quite clearly Section 5(11) operates to relieve carriers involved in a merger approved by the ICC of any requirement for State agency approval, the antitrust laws and other Federal, State or municipal law. Although the claim is made that this section reaches so far as to overcome provisions of the Railway Labor Act as applied to the Washington Agreement, the context and pattern of the section suggest otherwise. All of the references are to corporate, antitrust and State and local regulatory laws—there is no hint that labor-management relations are involved. Nothing in the legislative history was brought forward to suggest that a wholesale change in the procedures of the Railway Labor Act for modifying rules agreements—assuredly a fundamental and important change—was intended. Any such endeavor would have meant a major legislative battle on the point; but no such thing occurred. It staggers the imagination that so radical a change was in fact meant and made without anyone noticing at the time.[2] Nor was such an effect necessary as to mergers because the Washington Agreement provided the mechanism to accomplish them. (The

[2] Note 2 in Brotherhood of Locomotive Engineers v. Chicago and N.W. Ry. Co., (CAS, 1963) 314 F.2d 424, 432 is not persuasive on this point. Such comparisons may be indicative but are hardly dispositive of Congressional intent.

Harrington Amendment was an unsuccessful attempt to get more than the Agreement gave employees; its rejection by Congress does not mean that where their national agreement applied they were to get less.) As noted many years ago by Referee Gilden in the opinion in Docket No. 27:

> The Transportation Act of 1940, of which Section 5(2)(f) of the Interstate Commerce Act is a part, was enacted with full knowledge and thorough familiarity with the terms of the Washington Agreement. There is no discernible manifestation of any Congressional design to emasculate it entirely or otherwise to thwart or subdue its potency. Actually, its legislative history reveals an affirmative willingness by Congress to permit the protective features embodied in the Washington Agreement to continue unimpaired alongside of those imposed by the statute on the Interstate Commerce Commission. . . .
>
> Implicit in the pronouncement made to Section 5(2)(f) to the effect that, notwithstanding the relief afforded in that provision and certain other sections, the Carriers and the authorized representatives of their employees could, nevertheless, thereafter enter into contractual arrangements for the protection of employee-interests adversely affected by Carrier transactions, is the recognition that all existing prior understandings, arrived at by the same principals, dealing with the identical subject, and similarly designed to serve the very same purpose, are also sanctioned.

In that case the Carriers argued that Section 5(2)(f) vitiated the Washington Agreement. The Referee rejected the contention, also noting that Carriers had not given any indication of withdrawing from the Washington Agreement.

In Docket No. 64 I rejected a similar contention by the Organization that an outstanding Commission order imposing the New Orleans conditions (which included the

arbitration provisions of the Oklahoma Conditions), issued pursuant to Section 5(2)(f), precluded application of the Washington Agreement's procedure. I noted that the earlier ruling was made in the face of ICC conditions much like the Oklahoma Conditions. The differences between those arbitration provisions and those in the ICC order in the Southern-Central case provide no reason for a different conclusion here.

Carriers also argued that Docket No. 64 differs from this case because in the former the Commission expressly imposed the New Orleans Conditions which import the Washington Agreement. Docket No. 27 is not subject to such a distinction. In Docket No. 64 the Carrier argued that applicability of the Washington Agreement both under the authority of Docket No. 27 (deciding that Section 5(2)(f) and the Agreement coexist) and that the ICC-imposed conditions included the Washington Agreement. My decision was based upon the former ground.

The interplay of the Washington Agreement and the Railway Labor Act must be understood. The Agreement was designed to facilitate mergers, consolidations, and the like but on stated conditions (notice, implementing agreement, benefits to those adversely affected). The Railway Labor Act prevents either carriers or unions from making unilateral changes in those agreed provisions; the Agreement also has limits upon the termination of its applicability. Hence when a merger etc. is undertaken before the required steps to end the Agreement are taken this Agreement binds the union to permit the job combinations required by the merger and requires the carriers involved to follow its procedures and accord its benefits. The recognition given the Washington Agreement in the last sentence of Section 5(2)(f) indicates that Congress regarded such a private contractual arrangement as harmonious with the ICC power to impose employee protective conditions. That provision should be read with Section 5(11). The recognition and encouragement thereby accorded the Agreement argues

that it is not overridden by Section 5(2)(f) nor is the protection accorded to the Agreement by Section 6 of the Railway Labor Act vitiated.

After the Section 13 Committee's hearings and executive sessions the Southern submitted a memorandum citing, for the first time,[3] authorities which arguably would lead to a different conclusion. While language in all of them indicates the broad scope of Section 5(11), the differing contexts and issues of the cited cases and this set of cases involving the Southern and Central of Georgia must be taken into account. Texas v. United States, 292 U.S. 522, 533-34 (1934) and Schwabacher v. United States, 334 U.S. 182, 200, 201 (1947) are hardly opposite. Kent v. CAB, (2d Cir. 1953) 204 F2d 263, is put forward for the proposition that federal agency power in carrier merger cases extends to overriding private collective agreements. The court there dealt with the CAB's power which it likened to that of the ICC; it also compared the CAB's power to override a collective agreement dealing with the normal subjects of such contracts with the way in which collective agreements take precedence over individual contracts of employment under the National Labor Relations Act—an example of how a court may blur innumerable differences which are apparent and important to those familiar with the many peculiarities of labor relations and agreements in different fields (to say nothing of the many differences in the applicable statutes) and parlay them into possibly unwaranted propositions. Among the many differences in the situations discussed in that case and this group of cases is that the last sentence of Section 5(2)(f) explicitly provides for the concurrent existence, and there-

[3] I have received and considered all the material and arguments submitted by the parties no matter how late in the proceeding some of it was submitted. Certain material does not require extended comment, e.g., copies of letters from the Commission's Congressional Liaison Office, the Commission chairman and other commission officials purporting to show that certain parts of the Washington Agreement were not included in the Commission's orders. Their probative value seems negligible.

by operative effect, of private agreements providing employee protection and ICC-imposed conditions.

Brotherhood of Locomotive Engineers v. Chicago and N.W. Ry. Co., (8th Cir. 1963), 314 F.2d 424, dealt with a railroad merger situation in which the parties agreed that a somewhat modified version of the Washington Agreement provided "a fair and equitable arrangement for the protection of interests of such employees as provided in Section 5(2)(f) . . ." and the Commission adopted the agreed upon arrangements in its order approving the purchase of one carrier's facilities and rights by another looking to the coordination of some facilities. The acquiring carrier gave the required Section 4 notice and sought to negotiate an implementing agreement. The carrier sought arbitration when negotiations stalled in the face of a union contention that the coordination constituted changes in rules which could only be accomplished under the procedures prescribed by the Railway Labor Act for such changes. In this context the court held that Section 5(2)(f) displaced the requirements of the Railway Labor Act. Quite apart from the dubious reliance upon Kent v. CAB for that conclusion, the case does not present any conflict between Section 5(2)(f) and the Washington Agreement. Indeed it was a modified version of the Agreement concluded by the parties that was being enforced under Section 5(2)(f); no challenge to the last sentence of Section 5(2)(f), validating private employee protective agreements, was involved. (N.B.: The Court's caution that "We limit our decision to the peculiar factual situation of the present case." 314 F.2d at 434.) These cases, then, do not lead to the conclusion that Section 5(2)(f) displaces the Washington Agreement.

The Section 13 Committee has processed many cases involving the New Orleans and other conditions and innumerable implementing agreements under the Washington Agreement have been concluded despite the prior issuance of ICC orders imposing various protective con-

ditions. This pervasive and consistent conduct is at odds with the Carriers' assertion that the Washington Agreement is a nullity.

Congress did override the Railway Labor Act when the dispute over firemen and crew consist did not respond to innumerable emergency boards and a presidential commission and threatened a national tie-up of rail transportation. Only then did the President propose and Congress reluctantly provide that a public agency (other than the Commission as originally proposed by the President) impose terms of employment. It approaches the absurd to entertain the notion that essentially the same thing happened *sub silentio* in the 1940 enactment of Sections 5(2)(f) and 5(11) where no such crisis had existed, no bargaining stalemate had occurred, and no stoppage impended.

The background and purpose of the Washington Agreement and Section 5(2)(f) differ. The first is a voluntary national collective bargaining agreement which stems from the peculiar nature of railroad rules agreements—it is the key which unlocks the rules preventing transfer and consolidation of work. Section 5(2)(f) is a statutory requirement which comes into play when carriers seek governmental permission to merge facilities. It is the price imposed by government for such permission in the interest of balancing employee interests with those of carriers and the public.[4] In seeking that permission carriers do not seek relief from another private agreement; they accept the Commission's terms for the grant of government permission to take certain steps.

[4] "Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the cost of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege." United States v. Lowden, 308 U.S. 225, 240 (1939) speaking of the predecessor provision of Section 5(4)(b). The Court equated Section 5(4)(b) with the then pending bills which brought forth Section 5(2)(f).

While typically employee organizations intervene, they do so to avert actions which they believe will shrink employment opportunities and to maximize the protections afforded employees. The protective conditions granted often are superior in many respects to those in the Washington Agreement balanced off in some degree by somewhat more restrictive details. Because of this they usually have been accepted, even if more favorable conditions were sought from the Commission or the courts. No Commission action indicates an attempt to abrogate the Washington Agreement, although some of its conditions adopt the Washington Agreement with minor modifications. I doubt that the Commission could override the Washington Agreement if it wanted to; it can order higher benefits and impose them upon the carriers as the price of approving what they seek; but a more compelling showing of Congressional intention is required to obliterate a nationwide collective agreement not objected to by either management or labor—or, indeed any governmental agency—and supersede it with governmentally imposed conditions. More than two decades of conduct by railroad management and unions and by the Commission belie such a result. As the Commission noted in its announcement of February 17, 1964, (320 I.C.C. 377) in this case: it did not intend to supplant the Washington Agreement and, indeed, its protective orders have been patterned after that agreement. The Southern argues that the ICC (despite what it said in its 1964 statement) meant its arbitration provisions to displace those provided by Section 13 of the Agreement and offered the following quotation from the Commission (317 ICC 566):

> The possibility also exists that a carrier will refuse to accept arbitration procedures under paragraph 8 and require employees to invoke the provision of section 13 of the Washington Agreement, which involves a permanent committee whose decisions may be subject to protracted delay after a claim is made. In our opinion, fairness and equity

> require adoption with some modification, as hereinafter set forth, of the condition urged by the association with respect to arbitration, which will make mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee.

This language seems to say that the Section 13 Committee arbitrament is available but might be too slow, hence the Commission was providing an arbitration provision thought to be superior. This is quite different from saying that the Section 13 Committee procedure was to be superseded. Moreover, it hardly seems likely that the Commission would have concerned itself with Section 13 if it did not believe that the remainder of the Washington Agreement applied, for otherwise the Section 13 Committee would have no authority to act.

Given the preferred position of collective bargaining in nationwide agreement which provides for negotiation of employment aspects of mergers, (and provides its own machinery for averting deadlocks (See Docket No. 70)) it seems entirely unlikely that the Washington Agreement was cast aside by Congress without specific mention of the fact. This conclusion is all the stronger for the fact that the notice and implementing agreement provisions have proved workable again and again in coordinations between carriers where ICC protective conditions had been issue.

Carrier Members urge that two court proceedings concerning this controversy have led the parties back to the ICC and that its decision should be awaited. In companion cases,[5] the Court of Appeals for the Fifth Circuit declined to rule preferring to have the issue determined preliminarily by the ICC pursuant to the earlier remand of another case by the Supreme Court. The Supreme

[5] Switchmen's Union v. Central of Georgia R. Co., 341 F2d 213 (1965); Brotherhood of Railway Clerks v. Southern R. Co., 341 F2d 217 (1965).

Court of the United States[6] remanded the other case to the district court with instructions to have it remanded to the Commission with instructions "to amend its reports and order as necessary to deal with appellants' [a union's] request that Sections 4, 5, and 9 be included as protective conditions, specifically indicating why each of these provisions is either omitted or included. See United States v. Chicago, M. St. P. & Pac. R. Co., 294 U.S. 499, 511." (The cited case was decided in 1935, before the Washington Agreement, and does not deal with it; it does deal with the requisites of an appellate record where agency action is contested.) Both courts indicated they sought clarification of what the ICC had ruled and why. While the ICC's view of the impact of Sections 5(2)(f) and 5(11) undoubtedly would be influential with the courts, there is no certainty that the Commission will reach that issue. The Court's order seems to require the Commission to explain whether its conditions included certain parts of the Agreement or not and to explain the inclusion or omission; the issue before this Committee may not be dealt with by the Commission. The special history and experience of this Committee and the history of dealings by signatories to the Washington Agreement (some of whom played leading roles in the enactment of the 1940 provision) upon which this decision rests would seem to impart importance to the disposition of the issue of the interrelationship of the Agreement and Section 5(2)(f) in *this* proceeding. The Carriers raised the issue; the Committee is obliged to discharge its functions as best it can.

Southern's letter of July 12, 1966 submitted a copy of motion papers in Gary v. Midland Valley R.R. Co., Civ. No. 5995, (D.C.E.D. Okla) which include a memorandum by the attorney for some of the Organizations contrasting the New Orleans and Southern-Central conditions and declaring the inferiority, from the employees' view-

[6] Railway Labor Executives' Association v. United States 379 U.S. 199 (1964).

point, of the latter to the former. However, even if that analysis is accurate, it does not reach the issue before the Committee—whether the Washington Agreement is vital and applicable despite Section 5(2)(f) of the Act and Commission orders issued pursuant to it. I did not construe the ICC conditions in my draft opinion nor in this final opinion. This opinion is addressed to the interaction of the Act, Commission orders and the Agreement. If the Commission decides that its orders comprehended the notice and implementing agreement provisions of the Washington Agreement and if that decision is sustained, that would be one basis upon which the Agreement is applicable. That is not the basis of this ruling. Rather, the ruling that the Washington Agreement applies is that the background, purpose, and language of Section 5(2)(f) all maintain its operative force, as do the precedents and conduct of this Committee.

For all of these reasons, I conclude that the Washington Agreement was not abrogated nor modified by Sections 5(2)(f) or 5(11) or the ICC orders in Finance Docket No. 21400. Therefore, the Carriers violated the Washington Agreement by putting coordinations into effect without observing the important requirements of Sections 4 and 5. They therefore must (1) compensate employees for any loss of regular compensation or fringe benefits and (2) must give the requisite notices and negotiate the required implementing agreements. Until that is done employees are entitled to full compensation and fringe benefits as if the jobs had not been abolished. Docket No. 106.

When implementing agreements are achieved Washington Agreement benefits will extend through September 15, 1968 (five years from 90 days after June 17, 1963—the point in time when the Carriers, had they fulfilled their obligations, might have been able to expect that an implementing agreement should have been achieved). Indeed, that presumption favors the Carriers.

However, until they do negotiate such an agreement (or this Committee writes one in the event of a deadlock) the Carriers can hardly expect to pay the less than total compensation this Agreement allows to those who observe it. The effect of coordination upon any individual employees is to be determined as of the date such effect occurred. However, such an individual will be entitled to the equivalent of undiminished earnings until an implementing agreement is achieved,[7] after which the allowances payable under the Agreement shall go into effect. They are to be computed on the basis of the date of actual effect.

As to the portion of the decision ordering the Carriers to give the Section 4 notices and negotiate Section 5 implementing agreements, Carriers argue that such an order (1) exceeds the Referee's authority, (2) goes beyond the questions posed, and (3) is unrealistic in view of the many changes made since the coordinations were in fact begun in June 1963. As to (1) and (2), the discussion in Docket No. 106 is pertinent. As to (3), the notices and implementing agreements, of course, must take into account intervening events. But this is quite different from saying that where the parties have contracted to agree upon implementation, a *fait accompli* by the Carriers deprives the Organizations of their contractual rights. The Organizations may persuade the Carriers that other arrangements than those unilaterally made are desirable; in case of deadlock, the Committee may be persuaded or prescribe some other arrangement. That the Carriers' actions and resulting employee relocations, "releases," resignations and the like, may make implementing agreements more difficult to arrange may be a fact of life, but it is no excuse for scrapping integral parts of the Agreement. The Agreement must be observed.

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[7] The Carriers will, of course, be given credit for any wage or benefit payments employees had received.

APPENDIX E

Former Section 5(12) since recodified in 49 U.S.C. § 11341(a)

(12) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

APPENDIX F

Regional Rail Reorganization Act of 1973,
45 U.S.C. § 701, *et seq.* (Relevant Excerpt)

Section 503, 45 U.S.C. § 773 (repealed)

The Corporation shall have the right to assign, allocate, reassign, reallocate, and consolidate work formerly performed on the rail properties acquired pursuant to the provisions of this Act from a railroad in reorganization to any location, facility, or position on its system provided it does not remove said work from coverage of a collective-bargaining agreement and does not infringe upon the existing classification of work rights of any craft or class of employees at the location or facility to which said work is assigned, allocated, reassigned, reallocated, or consolidated and shall have the right to transfer to an acquiring railroad the work incident to the rail properties or facilities acquired by said acquiring railroad pursuant to this Act, subject, however, to the provisions of section 508 of this title.

(17)

No. 89-1027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

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Implicitly acknowledging that the judgment of the Court of Appeals cannot be sustained on the court's own terms, the Union Respondents have abandoned the court's reasoning and now advance a new set of arguments. To present their case, however, the Union Respondents have to ignore the plain language of the exemption statute, 49 U.S.C. § 11341(a), disregard the holding of *Schwabacher v. United States*, 334 U.S. 182 (1948), and impute to Congress an intent that is contradicted by express legislative actions over the decades. Moreover, even on its own terms, the Union Respondents' approach fails, point by point.

ARGUMENT

I. This Case Is Controlled By The Plain Language Of The Exemption Statute And By This Court's Decision In *Schwabacher v. United States.*

The Court of Appeals held that railroads carrying out ICC-approved consolidations are not exempt from claims based on labor agreements because (1) the exemption "from all other law" applies only to positive statutory enactments; (2) private contracts are not such enactments; and (3) labor agreements are private contracts. That holding obviously conflicts with *Schwabacher*, in which the Court gave effect to the plain language of the exemption statute, holding that the exemption "from all other law" applies to claims based on private contracts.

The Union Respondents do not defend the Court of Appeals' reasoning. Instead, they contend that claims based on labor agreements are outside the exemption not because they are *contractual* in nature, but because they pertain to *labor* relations. Thus, all the Union Respondents say about *Schwabacher* is that it does not apply here because it did not involve labor relations. Union Br. at 43 n.57.

For the Union Respondents to prevail here, the Court would have to hold that the statutory phrase "all other law" must be read to mean "all other law except the law pertaining to labor agreements." We have already shown, in our opening brief, why this reading is foreclosed. In Part II, below, we show why the specific contentions presented by the Union Respondents in support of their proposed rephrasing of the exemption statute should be rejected on their own merits. Preliminarily, we should explain why

much of what the Union Respondents have said in their brief is simply beside the point in connection with this Court's consideration of the question on certiorari.

First, this case is *not* about the ICC's continuing handling of the disputes between the railroads and the Union Respondents following remand by the Court of Appeals. Although the Union Respondents devote an extensive portion of their brief (pp. 10-15) to the ICC remand proceedings, nothing that has happened in those proceedings is pertinent to the question of the reach of the § 11341(a) exemption. The ICC has made clear that its June 20, 1990 Remand Decision, *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 6 I.C.C.2d 715 (1990),[1] was confined by the Court of Appeals' narrow reading of the exemption, which the ICC regards as establishing the law of the case pending this Court's decision here. *Id.* at 722, 745, 750, 756 n.34. Of course, the decision here will guide the further proceedings on remand, for it will matter, in the application of the ICC's authority to administer employee protective conditions under 49 U.S.C. § 11347, whether the railroads are already exempt from the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), and labor agreements to the extent necessary to permit them to carry out the approved consolidation; for this reason, the ICC has made clear that it will have to reconsider the Remand Decision if this Court agrees

[1] The ICC has denied the railroads' petitions to reopen and reconsider or clarify the Remand Decision. *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 22), decision served October 29, 1990.

with petitioners and the Federal Respondents as to the extent of the § 11341(a) exemption. But the reverse is not true; the ICC's interpretation of its § 11347 powers, undertaken in the shadow of the Court of Appeals' ruling, does not assist in resolving the problem of statutory construction now presented to this Court.[2]

Moreover, this case is *not* about the use of arbitration in supposed tension with the commands of the RLA, as the Union Respondents suggest (Br. at 33-34, 42, 44). Of course, the original ICC decision in this case (89-1027 Pet. App. at 29a) was rendered on review of an arbitration award (Joint App. at JA-8) which resolved a dispute between ATDA and these petitioners under the ICC's protective conditions. The ICC concluded, *inter alia*, that its arbitrator had framed his award on the basis of a correct understanding of the scope of the § 11341(a) exemption. But the exemption does not depend on arbitration, or any other specific form of dispute resolution, for its existence; it is self-executing and does not imply issuance of an ICC order of any kind beyond the

[2] The ICC set forth its position in its decision denying the railroads' petitions for a stay of the Remand Decision. *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 22), decision served July 20, 1990. See Appendix to Petitioner's Supplemental Response To Motion To Dismiss, filed by petitioner CSX Transportation, Inc. in Case No. 89-1028 on September 28, 1990 ("Pet. Supp. Resp. App. (89-1028)") at 10a. The ICC also made clear that it would have to reconsider any suggestion in the Remand Decision that the reach of § 11341(a) is merely coextensive with the ICC's authority under § 11347, see 6 I.C.C.2d at 754, if this Court were to reverse the Court of Appeals' decision. Pet. Supp. Resp. App. (89-1028) at 10a n.9.

original consolidation approval decision, *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 287, 298 (1987) (Stevens, J., concurring) (citing *Schwabacher*). Limitations on the use of compulsory arbitration under the RLA are plainly irrelevant to the decision whether that statute is, in the first instance, encompassed within "all other law" from which railroads carrying out an approved consolidation are exempt.

Questions involving the particular ways in which the protective conditions are applied, including questions regarding interpretation of the language of the conditions themselves as adopted by the ICC in accordance with its § 11347 mandate, are for another day. However, the orderly administration of the protective conditions, including judicial review of ICC decisions in the lower courts, will be assisted immeasurably by a determination now that the § 11341(a) exemption does extend to claims that are based on a railroad's contracts and are asserted exclusively under federal law.

II. Congress Has Not Limited The ICC's Authority Over Railroad Consolidations In Any Way That Changes The Operation Of The Exemption Statute.

Distilled, the Union Respondents' argument is that because Congress has not given the ICC general responsibility "to authorize new rates of pay, rules, or working conditions" (Union Br. at 40), § 11341(a) is ineffective to bar enforcement of RLA labor agreements that would prevent a railroad from carrying out a transaction the ICC had approved as in the public interest. In advancing this proposition, the Union Respondents simply cast ordinary principles of statutory construction adrift. The Union Respondents

make no attempt to explain why it matters whether or not the ICC has "complete control" over railroad labor relations (Union Br. at 43 n.57), and it clearly does not matter. By its terms, § 11341(a) vests the ICC with "exclusive" jurisdiction over consolidations and mergers and exempts railroads from "all other law" as necessary to permit them to carry out an approved transaction.[3] There has been no congressional action withdrawing railroad labor relations from the operation of § 11341(a).[4]

[3] This Court has long recognized that the exemption provision relieves carriers from the antitrust laws even though the ICC does not have "either the duty or the authority to execute" or "to enforce" those laws. *McLean Trucking Co. v. United States*, 321 U.S. 67, 79 (1944). The ICC is, of course, to take account of the policies underlying the antitrust laws when deciding where the public interest lies, *id.* at 85-87, but the ICC is "not to measure proposals for all-rail consolidations . . . by the standards of the anti-trust laws," *id.* at 85. Congress has similarly directed that the ICC consider "the interests of carrier employees affected by the proposed transaction," 49 U.S.C. § 11344(b)(1)(D), when passing on a proposed consolidation and, beyond that, has, in § 11347, mandated employee protective conditions to compensate employees who are adversely affected by the consolidation. Nothing in this suggests that § 11341(a) is ineffective in the face of the RLA (and labor agreements) because the ICC does not have the authority to execute and enforce that law.

[4] The Union Respondents assert (Union Br. at 24, 43) that § 11341(a) is an implied repeal statute, hoping by this to obtain the benefit of the doctrine that repeals by implication will be found to have occurred only when it is impossible to give effect to the competing statutes. But that doctrine has nothing to do with this case. Section 11341(a) does not implicitly repeal the RLA or any other statute; it creates an *express* exemption from "all other law," intended to permit railroads to carry out an approved transaction. *See generally Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966) (contrasting Shipping Act's express antitrust exemption for certain rate-making activity with argument that overall structure of the act impliedly repeals application of antitrust laws to the shipping industry as a whole). It is the Union Respondents who would have this Court fail to give effect to § 11341(a).

The Union Respondents, to be sure, assert that such a limitation was built into the exemption provision at the time of its first enactment, as 49 U.S.C. § 5(8), in the Transportation Act of 1920.[5] Their only support for this contention, however, is the fact that in Title III of the 1920 Act, ch. 91, 41 Stat. 456, 469, Congress created a Railroad Labor Board. Union Br. at 36. That fact plainly does not support the claimed limitation on the exemption provision, as we have previously explained (NW Br. at 31 n.33). There simply is no evidence that Congress intended the all-encompassing language of the exemption provision—"all other restraints or prohibitions by law, State or Federal . . . ."—to exclude Title III, a federal law. There certainly is no inconsistency between the establishment in Title III of an administrative structure intended to facilitate the voluntary resolution of day-to-day labor disputes and the simultaneous grant to the ICC of exclusive authority over mergers, backed by an exemption of sufficient breadth to relieve railroads, when necessary to the carrying out of such transactions, of any expectation that they would submit to the Title III dispute resolution scheme.[6]

[5] Transportation Act of 1920, ch. 91, § 407(8), 41 Stat. 456, 482, codified as 49 U.S.C. § 5(8).

[6] Title III provided for the voluntary creation of adjustment boards to arbitrate disputes concerning "grievances, rules, or working conditions," Transportation Act of 1920, § 303, 41 Stat. 469-70; *see id.* § 302, 41 Stat. 469, subject to appeal to the Railroad Labor Board, *id.* § 307(a), 41 Stat. 470; and for direct

The Union Respondents necessarily must find the labor relations exclusion to have been established in the 1920 Act, because they rely on it in their effort to avoid the obvious implication of Congress' handling of the issue in the next pertinent enactment,[7] the Emergency Railroad Transportation Act of 1933 ("ERTA"), ch. 91, 48 Stat. 211. The Union Respondents contend (Union Br. at 36-38) that the reason the exemption provision in the temporary ERTA Title I contained a savings clause for the RLA and labor agreements, while the one in the permanent ERTA Title II did not, is that the Federal Railroad Coordinator's powers exceeded those of the ICC and Congress wanted to ensure that the Coordinator's orders did not infringe upon RLA rights.[8] In so arguing, the Union Respondents necessarily *concede* that the plain language of the ERTA Title II exemption, a forerunner of § 11341(a), sweeps the RLA (and labor agreements) within its scope, for it would have been pointless for Congress to include a savings clause in

submission of such disputes to the Labor Board where no adjustment board was created, *id.* Disputes over wages were to be presented directly to the Labor Board. *Id.* § 307(b), 41 Stat. 471. Decisions of the adjustment boards and the Labor Board were not legally enforceable. *Pennsylvania R.R. System & Allied Lines Federation No. 90 v. Pennsylvania R.R.*, 267 U.S. 203, 215-16 (1925); *Pennsylvania R.R. v. United States Railroad Labor Board*, 261 U.S. 72, 84-85 (1923).

[7] The Union Respondents do not endorse the Court of Appeals' view that the enactment of the RLA in 1926 manifested a congressional intent to exclude labor agreements from the reach of the exemption provision. See NW Br. at 33 n.34.

[8] Thus, the Union Respondents assert, without reference to authority, that Congress "specifically limited" the ERTA Title I exemption provision "*because* [the Coordinator's] orders were mandatory . . . ." Union Br. at 36 (emphasis added).

ERTA Title I if the exemptive language, which was substantially the same in both ERTA titles, did not otherwise reach the RLA and labor agreements. The Union Respondents would hope to avoid this obvious conclusion by contending that the same words in the two ERTA titles really mean different things—that, in Title I, the words "restraints . . . by law, State or Federal" include the RLA, while in Title II they do not. But all the Union Respondents have to offer in defense of this innovative approach to plain language is the *deus ex machina* that the ICC lacks jurisdiction over labor relations. Union Br. at 38.[9]

The significance of ERTA is that the statute demonstrates clearly that Congress knows how to carve out special protection for the RLA and labor agreements when it chooses. Congress did so for a three-year period where it thought this appropriate, but did not do so in its general grant of authority to the ICC over consolidations, from which § 11341(a) is descended.

As for the failed Harrington amendment to the 1940 Act, the Union Respondents have virtually nothing to say (Union Br. at 39). This Court has explained that the Harrington amendment—whose language is essentially what the Union Respondents contend has somehow been in the law from the start—"introduced a new problem" as it "threatened to prevent all consolidations to which it related." *Railway Labor Executives' Association v. United States*, 339 U.S. 142,

[9] It was held long ago that the exemptive language in ERTA Titles I and II has a single meaning. *Texas v. United States*, 6 F. Supp. 63, 65 (W.D. Mo.) (three-judge court) (per curiam), *aff'd*, 292 U.S. 522 (1934).

151 (1950). Congress rejected the Harrington amendment for this reason, *id.* at 147-54, and neither the amendment's language nor its functional equivalent has been made part of the Interstate Commerce Act.

In this connection, we have already shown (NW Br. at 43-48) that the 1976 amendment of the predecessor to 49 U.S.C. § 11347[10] did not enact, *sub silentio*, the Harrington amendment by removing the RLA and labor agreements from the scope of the § 11341(a) exemption. We anticipated and answered all of the Union Respondents' arguments (Union Br. at 45-47) relating to the 1976 statutory amendment.

The Union Respondents also suggest, in passing, that § 11341(a) perhaps does not apply here at all because the transfer of work at issue in this case did not "carry out" the Norfolk Southern railroad control transaction that the ICC approved. Union Br. at 25-26. The control transaction, they would say, was fully "carried out" when Norfolk Southern Corporation exchanged its stock certificates for the stock certificates evidencing separate ownership of NW and Southern. The Union Respondents of course cite no authority in support of this proposition, which ignores the obvious meaning of the statutory words, and the proposition is insupportable. *Texas v. United States*, 292 U.S. 522, 533-35 (1934).[11] The courts have routinely

[10] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 402(a), 90 Stat. 31, 62.

[11] In *Texas v. United States*, the Court, holding the statutory exemption then in effect (ERTA Title II) applicable to the ICC's approval of a lease providing for the removal of offices from Texas in disregard of state law restrictions, said:

> The scope of the immunity must be measured by the

found that the § 11341(a) exemption applies to operational changes that constitute the implementation of ICC-approved rail transactions. *E.g.*, *Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d 107, 111-12 (8th Cir. 1986) (per curiam) (operation of trains using trackage rights authorized by the ICC in connection with a rail merger held exempt from RLA challenge), *cert. denied*, 482 U.S. 927 (1987); *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424, 427, 431 (8th Cir.) (post-merger coordination of rail yards held exempt from RLA), *cert. denied*, 375 U.S. 819 (1963). *See generally ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. at 287 (Stevens, J., concurring).[12]

Lacking any support for their reading of § 11341(a) in the actions of Congress, the Union Respondents turn instead to the actions of the ICC and of the railroads themselves. But no support for the Union Respondents' position is to be found in either place.[13]

> purpose which Congress had in view and had constitutional power to accomplish. As that purpose involved the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure, the removal of such burdens when imposed by state requirements was an essential part of the plan.

292 U.S. at 534-35.

[12] There is no significance to the fact (Union Br. at 3) that when NW and Southern filed their primary ICC control application, they also filed, as statutorily required, four companion applications for approval of the construction of connecting tracks and two for approval of line abandonments. *Norfolk Southern Corp.—Control—Norfolk & Western Ry. and Southern Ry.*, 366 I.C.C. 173, 245-47 (1982).

[13] The Union Respondents also cite to *Texas & New Orleans*

The ICC decisions cited by the Union Respondents (Union Br. at 28-32) belie the contention that, before 1983, the ICC took the position that transactions it had approved as in the public interest remained vulnerable to defeat through the assertion of RLA-derived rights. In *Chicago, St. Paul, Minneapolis & Omaha Ry. Lease*, 295 I.C.C. 696 (1958), the ICC merely held that there was no need for it specifically to declare whether a carrier should be relieved from the RLA because the exemption provision was self-executing. *Id.* at 702.[14] The whole point of *Southern Ry.—Control—Central of Georgia Ry.*, 331 I.C.C. 151 (1967), was to make clear that employees could *not* invoke RLA rights in connection with the carrying out of an approved transaction, *id.* at 162-64, as the assertion of such rights "would seriously impede mergers," *id.* at 171. And in *Norfolk & Western Ry.*

R.R. v. Brotherhood of Railroad Trainmen, 307 F.2d 151 (5th Cir. 1982), *cert. denied*, 371 U.S. 952 (1963), in support of their position that the ICC's "exclusive jurisdiction" under § 11341(a) is really of "limited nature." Union Br. at 41. But *Texas & New Orleans* stands for no such proposition. In that case, the Fifth Circuit held only that, in the circumstances presented, 49 U.S.C. § 5(11) (the predecessor to § 11341(a)) did not operate to overcome the withdrawal of federal court jurisdiction to enjoin a strike accomplished in the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115. The Fifth Circuit, however, went on to make clear that if the ICC's jurisdiction over transactions was "being frustrated by application of Norris-LaGuardia to the present suit, we would have to conclude that Norris-LaGuardia was preempted by section 5(11), even though section 5 is not labor legislation." 307 F.2d at 158.

[14] The ICC also observed, on the facts of the case, that the RLA had not been shown to have been a barrier to the carrying out of the particular lease transaction involved. 295 I.C.C. at 702.

and New York, Chicago & St. Louis R.R.—Merger, Etc., 347 I.C.C. 506, 511-12 (1974), the ICC expressly stated that the exemption provision applies to RLA-derived rights. That position has long been and remains a cornerstone of ICC regulation of mergers and consolidations.[15]

Nor is there anything in the railroads' own behavior over the years that would suggest that the railroads thought themselves subject to labor agreement claims that could defeat the carrying out of approved mergers. The Union Respondents contend (Union Br. at 17, 27) that the railroads must have had such an understanding because otherwise the railroads would not have entered into supposedly costly agreements in connection with several significant mergers, mostly in the 1960s, which provided employees with guarantees of lifetime employment (so-called attrition protection agreements). No such inference is permissible.

In case after case, the record makes clear that the railroads of that era considered the cost of attrition protection to be slight—in some instances even less than the cost of compliance with the employee protective conditions that would otherwise have been imposed by the ICC under the predecessor to § 11347. *E.g., Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. 475, 544 (1966) (carriers calculated that cost of attrition protection would be $5 million less than cost of ICC's protective conditions); *Norfolk*

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[15] *Gulf, Mobile & Ohio R.R.—Abandonment*, 282 I.C.C. 311, 335 (1952), evidences not a disavowal (Union Br. at 21 n.37) but a recognition of the ICC's authority to abrogate private contracts in the case of transactions, unlike the one involved in *Gulf, Mobile* itself, to which the exemption provision applied. See NW Br. at 20 n.23.

& Western Ry. and New York, Chicago & St. Louis R.R.—Merger, Etc., 324 I.C.C. 1, 89 (1964) (anticipated gain in number of jobs available on the merged system would counterbalance the costs of protecting existing employees against loss of jobs); *Norfolk & Western Ry. Merger, Etc., Virginian Ry.*, 307 I.C.C. 401, 439 (1959) (same).

Moreover, the railroads considered the costs associated with providing attrition protection to be far outweighed by the gains the railroads obtained in the bargains they struck with the unions. Typically, the railroads obtained the contractual right to transfer employees and work throughout the merged systems, *without regard* to whether the transfers were necessary to the carrying out of the approved mergers—an advantage beyond what the railroads could obtain by virtue of the statutory exemption.[16] And in exchange for attrition protection, the railroads also obtained the unions' agreement to drop their opposition to the mergers.[17]

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[16] *E.g., Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. at 685; *Norfolk & Western Ry. and New York, Chicago & St. Louis R.R.—Merger, Etc.*, 324 I.C.C. at 89; *Great Northern Pacific & Burlington Lines, Inc.—Merger, Etc.—Great Northern Ry.*, 331 I.C.C. 228, 278 (1967), *aff'd sub nom. United States v. ICC*, 296 F. Supp. 853 (D.D.C. 1968) (three-judge court), *aff'd*, 396 U.S. 491 (1970).

[17] For example, as a result of the Orange Book agreement involved in Case No. 89-1028, labor ended its challenge to the ICC's approval of the consolidation of the Atlantic Coast Line Railroad and the Seaboard Air Line Railroad. *See Florida East Coast Ry. v. United States*, 259 F. Supp. 993, 1017-19 (M.D. Fla. 1966) (three-judge court) (RLEA "bitterly attacks as inadequate" the employee protective conditions imposed by ICC), *aff'd in part and appeal of RLEA dismissed as moot per curiam*, 386 U.S. 544, 545 (1967).

The Union Respondents even claim to find comfort in the bipartisan support for the lifetime protective benefits that Congress wrote into Title V of the 3R Act, which created Conrail.[18] According to the Union Respondents (Union Br. at 27-28), the railroad industry's support for those generous employee benefits somehow shows that the railroads did not believe that the ICC's approval of an ordinary rail merger under the Interstate Commerce Act carried with it any exemption from the restrictions of existing labor agreements. But the Union Respondents ignore that the conveyance of bankrupt railroad properties to Conrail was not an ordinary merger under the Interstate Commerce Act; that Title V labor protection was largely to be funded by the government, not the railroads; that employees of the former Penn Central—the principal predecessor to Conrail—already enjoyed lifetime wage protection and the 3R Act therefore did not expand but merely continued in effect an existing level of benefits; and that, as part of the package, Conrail was given the right to transfer work and employees throughout its system without regard to whether the transfer was causally related to the transaction authorized by the 3R Act.[19]

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[18] Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985.

[19] Title V was repealed in 1981 by the Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 669, largely because it proved too expensive, Northeast Rail Service Act of 1981, 95 Stat. 644, 45 U.S.C. § 1101(4). Moreover, the ICC itself has made clear that Title V represented "a development arising outside the mainstream of employee labor protection under section 5(2)(f) of the [Interstate Commerce] act." *Oregon Short Line R.R.—Abandonment Portion Goshen Branch*, 354 I.C.C. 76, 84 (1977).

Point by point, there simply is no substance to any of the contentions advanced by the Union Respondents. This is hardly surprising. More than fifty years ago, this Court recognized that employees inevitably would lose fundamental contract rights as a consequence of ICC-approved railroad mergers. *United States v. Lowden*, 308 U.S. 225, 233 (1939). It was precisely because of the need to redress such loss that the ICC was authorized to impose compensatory employee protective conditions even absent a specific statutory directive. *Id.* at 233-34 ("just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national transportation policy of railroad consolidation" furthers the successful prosecution of that policy). Finally, the question whether § 11341(a) reaches labor agreements governed by the RLA was addressed, and answered in the affirmative, by the four Justices concurring in the judgment in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. at 295, 298, an opinion the Union Respondents have elected not to mention.

III. The Straightforward Question Of Statutory Interpretation Presented By This Case Is Not Influenced By Any Fifth Amendment Issue.

Although the Union Respondents do not squarely assert that the ICC order in this case accomplished a "taking" of property or deprived them of due process within the meaning of the Fifth Amendment, they contend that the Court should read § 11341(a) their way in order to avoid creating a possible constitutional difficulty. Union Br. at 47-49. The invitation should be declined not only because the Union Respondents' statutory interpretation is plainly in-

correct, but also because the supposed constitutional problem is nonexistent.

The purported "taking" claim fails the analysis of *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). There, the Court stated that whether a given governmental action constitutes a Fifth Amendment taking should be determined on the basis of an ad hoc factual analysis of three factors of "particular significance": the economic impact of the regulation on the claimant; the extent to which the regulation has interfered with distinct investment-backed expectations; and the character of the governmental action. *Id.* at 225; *accord Bowen v. Gilliard*, 483 U.S. 587 (1987).

The enforceability of contracts that relate to the railroad industry has always been contingent on the federal government's legislative and regulatory initiatives. *E.g., Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 482 (1911) (statute forbidding free passes for travel by rail that deprived plaintiffs of their lifetime passes did not effect a taking because regulation of the industry was foreseeable). The NW employees represented by ATDA in this case could not reasonably have expected their contracts to be immune from federal regulation. *See United Transportation Union v. Consolidated Rail Corp.*, 535 F. Supp. 697, 705-08 (Special Ct., Regional Rail Reorg. Act) (Friendly, J.) (no taking where statute extinguished contract rights of railroad employees and subjected some employees to termination), *cert. denied*, 457 U.S. 1133 (1982); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307-08 (1935) ("Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control

of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.").[20]

The ICC's routine imposition of employee protective conditions in railroad consolidation cases, in accordance with the Interstate Commerce Act, reconciles the interests of railroads and their employees. All the NW employees whose interests are involved in this case have received the full benefit of the protective conditions, including wage protection for up to six years. In addition, these employees benefitted from having the opportunity to be hired by Southern as officers, on better terms and at higher pay than they had previously enjoyed.[21]

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[20] "Perhaps no industry has a longer history of pervasive federal regulation than the railroad industry." *Consolidated Rail Corp. v. Metro-North Commuter R.R.*, 638 F. Supp. 350, 357 (Special Ct., Regional Rail Reorg. Act 1986) (citing *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 469 (1985), and holding that statute relieving congressionally created rail corporation of its contractual obligations to provide commuter services did not effect a taking despite financial loss caused to the other contracting parties).

[21] The Union Respondents acknowledge that employees receive compensation through the mechanism of the ICC's protective conditions but they find the compensation insufficient, saying that the conditions "protect an employee's compensation but, because they are premised on the assumption that contract rights will be preserved, do not compensate employees for lost *contract* rights." Union Br. at 49 (emphasis in original). The extent to which the protective conditions contemplate the preservation of existing contracts is a subject of dispute, but the resolution of that dispute does not bear on the question presented on certiorari. Our view is that the protective conditions safeguard existing contract arrangements to the extent that the ICC, in implementing its 49 U.S.C. § 11347 authority, has decided such action is appropriate. No claim of constitutional magnitude is precipitated by the ICC's decision.

Here, the ICC did not appropriate any assets for public use, but merely presided over a legitimate adjustment of the "benefits and burdens of economic life to promote the common good," *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. at 225. There is, accordingly, no taking for which compensation would be required.[22]

There is, similarly, no reason to entertain the Union Respondents' supposed due process complaint. A federal statute alleged to impair a private contract is subject to "especially limited," "minimal" judicial scrutiny. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 472 (1985). "The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and ' "establish that the legislature has acted in an arbitrary and irrational way." ' " *Id.* (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).[23] No such showing could conceivably be made here. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 15 (Court has long "upheld against due process attack the competence of Congress to allocate the interlocking eco-

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[22] The Union Respondents could not press a taking claim in any event until they had sought compensation through the presumptively available Tucker Act remedy. *See, e.g., Preseault v. ICC*, 110 S. Ct. 914, 921-22 (1990).

[23] Even this minimal scrutiny is not reached unless the impairment of private contract is proved "substantial." *National R.R. Passenger Corp.*, 470 U.S. at 472.

nomic rights and duties of employers and employees . . . regardless of contravening arrangements between employer and employee"); *Atkins v. Parker*, 472 U.S. 115, 129-30 (1985) (Where federal legislation adjusts economic benefits and burdens, " 'the legislative determination provides all the process that is due.' ") (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)); *United Transportation Union v. Consolidated Rail Corp.*, 535 F. Supp. at 705-08.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Nos. 89-1027 and 89-1028

In the Supreme Court of the United States

OCTOBER TERM, 1990

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v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, ET AL.

CSX TRANSPORTATION, INC., PETITIONERS

v.

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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Section 11341(a) of the Interstate Commerce Act (ICA) provides that a participant in an ICC-approved merger transaction "is exempt from the antitrust laws and all other law, including State and municipal law, as necessary to let that person carry out the transaction" (49 U.S.C. 11341(a)). The question in this case is whether Section

11341(a)'s exemption shields the participant from enforcement of contractual provisions that otherwise would thwart implementation of the merger. See 89-1027 Pet. i. We explained in our opening brief that Section 11341(a) means what it says: it exempts the participant from *all* law, including laws governing the negotiation and enforcement of collective bargaining agreements, to the extent necessary to implement the ICC approved transaction. The court of appeals thus erred in concluding that Section 11341(a) reaches only "positive enactments" and does not preempt laws effectuating contractual rights. Pet. App. 12a-19a.

We restate the question presented in this case because the union respondents exhibit little interest in addressing it. The union respondents do not contest our basic proposition that Section 11341(a) exempts a carrier from enforcement of contractual provisions that otherwise would thwart implementation of a merger. Nor do they make any attempt to defend the court of appeals' view that Section 11341(a) is somehow inapplicable here because it reaches only "positive enactments." Pet. App. 18a. Indeed, the union respondents ultimately concede that Section 11341(a) exempts rail carriers from enforcement of contractual obligations involving the "capital structure" of their railroads. Resp. Br. 43 n.57 (acknowledging *Schwabacher* v. *United States*, 334 U.S. 182 (1948)). They contend, instead, that Section 11341(a) does not apply in this case because the ICC lacks "control over labor matters." Resp. Br. 43 & n.57. See also *id.* at 16, 24, 26, 33. They then invite this Court to decide an entirely different question – one that the court of appeals did not reach, that is the subject of the ICC's proceedings on remand, and that presently is in an interlocutory posture: namely, the ICC's responsibility to impose labor protective conditions under Section 11347 of the ICA.

1. *The union respondents do not defend the court of appeals' reasoning.* The threshold problem with the unions' position is that it bears no relation to what the court of appeals actually decided. The court of appeals did not rule that Section 11341(a) is inapplicable to the enforcement of collective bargaining agreements because those contracts involve labor matters. The court ruled that Section 11341(a) does not apply to enforcement of collective bargaining agreements because Section 11341(a) does not apply to enforcement of contracts of *any* type. Pet. App. 12a-19a.[1] In the court of appeals' view, Section 11341(a) reaches only "positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a.[2]

The union respondents are entitled, of course, to defend a judgment on grounds other than those stated in the court of appeals' opinion. But in making that election, they tacitly concede that the court of appeals' rationale is indefensible. That concession is understandable. As we explained in our opening brief (at 22-27), Section 11341(a) gives a participant in an ICC-approved transaction an ex-

[1] The court of appeals spoke in terms of "overrid[ing] contracts" (Pet. App. 12a); however, as we explained in our opening brief (at 22, 24-26), contracts derive their enforceability from common or statute law – in this case the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*

[2] That the court of appeals approached the question as one involving all contracts, and not simply collective bargaining agreements, is evident from its concern that acceptance of the government's argument would give the ICC power to override a "carrier's solemn undertaking, in a bond indenture or a bank loan." Pet. App. 13a. See also, *e.g.*, *id.* at 12a ("Nowhere does [Section 11341(a)] say that the ICC may also override contracts, nor has it ever * * * included even a general reference to 'contracts' much less any specific reference to [collective bargaining agreements]."); *id.* at 18a ("We are confident that Congress did not intend, when it enacted the immunity provision, to override contracts."); *ibid.* ("Congress exhibited a healthy respect for privately negotiated contracts.").

press exemption from *all* law to the extent necessary to carry out the transaction, and the term "law" is understood to include common law rules as well as statutes. See, *e.g., Illinois* v. *City of Milwaukee*, 406 U.S. 91, 99-101 (1972); *Warren* v. *United States*, 340 U.S. 523, 526 (1951); *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78-79 (1938). Furthermore, this Court, in *Schwabacher*, 334 U.S. at 195-201, held that the substantively identical precursor of Section 11341(a), Section 5(11) of the ICA, exempts a participant in an ICC-approved transaction from enforcement of contractual rights—in that case the contractual rights of a carrier's minority shareholders. See Fed. Resp. Br. 27-28. The union respondents have no answer to these points beyond the assertion that they are "inapposite" in this instance because this case involves "labor matters." Resp. Br. 43 n.57.

2. *The union respondents' position is contradicted by the plain language of Section 11341(a).* The union respondents argued to the court of appeals that Section 11341(a) does not reach labor matters, and that court, for good reason, chose not to accept the argument. Section 11341(a), by its terms, does not give "labor matters" special treatment. The union respondents contend that Section 11341(a)'s "plain language" supports their assertion (Resp. Br. 24), but they fail to confront (or even acknowledge) the words Congress actually used. Section 11341(a) expressly exempts participants in ICC approved transactions "from the antitrust laws and from all other law." 49 U.S.C. 11341(a).[3] It makes no mention whatever of a special exception in the case of labor matters. Instead,

[3] The union respondents characterize Section 11341(a) as "an implied repeal statute" (Resp. Br. 24). There is, however, nothing "implied" in the statute at all. By its terms, Section 11341(a) *expressly* exempts participants from all law as necessary to implement an ICC approved transaction.

the Section 11341(a) exemption is subject to only one very important qualification: the exemption extends only so far "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a).[4] See *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 298-300 (1987) (Stevens, J., concurring).

3. *The union respondents' argument that the ICC has no "jurisdiction" over labor matters is neither relevant nor correct.* The union respondents repeatedly assert that Section 11341(a) should be given a more restrictive reading because the ICC lacks "jurisdiction," "authority," or "control over labor matters." Resp. Br. 16, 24-25, 26, 33, 35, 36, 41, 43 & n.57. This argument fails for two reasons. First, the applicability of Section 11341(a)'s exemption does *not* depend on whether the ICC has "jurisdiction" over the subject matter of the preempted law—Section 11341(a) expressly exempts participants from the "antitrust laws and all other laws" as necessary to carry out an ICC approved transaction. 49 U.S.C. 11341(a). Second, the union respondents' assertion is simply not correct; the ICC's empowering statute requires the agency to consider and address labor matters.

One of the purposes of the ICA's national transportation policy, which is administered by the ICC, is "to promote a safe and efficient rail transportation system" while "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry" (49 U.S.C. 10101a). The ICA gives the ICC "exclusive" authority over transactions involving the consolidation, merger, or acquisition of control of rail carriers (49 U.S.C. 11341(a), 11343). These transactions inevitably affect labor. See *United*

[4] The court of appeals did not reach the question of what constitutes necessity within the meaning of the exemption, and that issue is not presently before the Court in this case.

States v. *Lowden*, 308 U.S. 225, 233 (1939). The ICA therefore expressly *requires* the ICC to consider labor matters when performing its "public interest" review of a proposed transaction (49 U.S.C. 11344), and the ICA expressly *requires* the ICC "to provide a fair arrangement" for "employees who are affected by the transaction" (49 U.S.C. 11347). The union respondents' blanket assertions that Section 11341(a) does not apply to labor matters because the ICC has no jurisdiction over such matters cannot be reconciled with the plain terms of the ICA.

4. *The union respondents incorrectly assert that their interpretation is consistent with past practices.* Because the ICA's language provides no comfort for their position, the union respondents must look to other sources for support. They turn first to historical practices. The unions argue (Br. 26-27) that the ICC historically has declined to exercise jurisdiction over labor matters. That is not so. See, *e.g.*, *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142 (1950); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir. 1963); *Norfolk & W. Ry. and New York, C. & St. L. R.R.—Merger, Etc.*, 347 I.C.C. 506 (1974). The union respondents also rely on a 1934 statement of the Chairman of the ICC that the agency has "no jurisdiction over labor matters." Resp. Br. 26-27. As the unions acknowledge, however, that statement was addressed to the specific question whether the ICC should assist in the enforcement of the RLA. *Ibid.* Moreover, it was made six years prior to Congress's addition to the ICA of the requirement that the ICC impose labor protective conditions on ICC-approved transactions. See Fed. Resp. Br. 35-38.

The union respondents next observe (Br. 13 n.26, 27-29) that, in the past, railroads have occasionally entered into various "lifetime employment" agreements with rail unions in connection with ICC approved mergers. The

unions contend that railroads would not have agreed to such terms if Section 11341(a) had preempted enforcement of the existing collective bargaining agreements. But any such inference is unwarranted. The railroads may have had other reasons for entering into those agreements. They may have concluded that Section 11341(a) would not permit the labor rearrangements they sought because those rearrangements were not "necessary" to carry out their transactions. See 49 U.S.C. 11341(a). The railroads may have sought to avoid litigation or may have found the terms of the "lifetime employment" agreements desirable even if not required. Thus, the existence of those agreements does not provide any useful guidance on the meaning of Section 11341(a).[5]

The union respondents next argue (Br. 28-32) that the ICC's interpretation of Section 11341(a) is a recent innovation. But the ICC expressly stated, as early as 1974, that Section 11341 and its precursors reach collective bargaining rights. See *Norfolk & W. Ry. and New York, C. & St. L. R.R.—Merger, Etc.*, 347 I.C.C. 506, 511-512 (1974) ("the Commission may relieve the railroad from the requirements of [the Railway Labor Act] insofar as is necessary to carry into effect the transaction approved pursuant to section 5(2)").[6] And the courts have applied that interpretation as early as 1963. *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d

[5] The union respondents also contend (Br. 7 n.12) that the effect of the ICC's interpretation of Section 11341(a) is to render "unnecessary" the making of such agreements. That is not accurate. The railroads may continue to find such agreements useful for the reasons we describe in the text.

[6] In any event, an agency is entitled to revisit, refine, and reformulate its interpretations in light of its evolving wisdom and experience. See, *e.g.*, *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990); *NLRB* v. *J. Weingarten*, 420 U.S. 251, 265-266 (1975).

424, 432 (8th Cir. 1963) ("We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of § 5(11)."). The unions cite (Br. 29-32) two ICC cases that, in their view, indicate that Section 11341(a) does not preempt enforcement of collective bargaining agreements. In both of those cases, however, the ICC stated that the rail carriers were not entitled to Section 11341(a) relief because the requested exemption was not necessary to carry out the ICC-approved transaction.[7]

The union respondents also assert (Br. 32-33) that the ICC has no "expertise" in labor relations. The ICC, however, administers the ICA and obviously is the expert agency as to the interpretation and application of the ICA's labor provisions. Moreover, the ICC cases that the unions cite in support of their assertion involve the ICC's referral of disputes to arbitrators appointed pursuant to the ICC's labor protective conditions (49 U.S.C. 11347). The ICC has authority to review those arbitration decisions, *Chicago & N.W. Transp. Co.—Abandonment*, 366 I.C.C. 373 (1987), aff'd *sub nom. International Brotherhood of Electrical Workers* v. *ICC*, 862 F.2d 330 (D.C. Cir. 1988). The ICC's referral of these matters simply reflects a sensible use of the arbitration process. See *United Transp. Union* v. *United States*, 905 F.2d 463, 470 (D.C. Cir. 1990).

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[7] See *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151, 170 (1967) ("By its terms, section 5(11) applies only to antitrust and other restraints of law from carrying 'into effect the transaction so approved . . .'. Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint * * *."); *Chicago, St. P., M. & O. Ry.—Lease*, 295 I.C.C. 696, 702 (1958) ("It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order.").

5. *The union respondents incorrectly assert that the ICA's legislative history supports their interpretation.* The union respondents also argue (Br. 33-44) that the ICA's legislative history supports their contention that Section 11341(a) contains an implicit exception for labor matters. As we explain in our opening brief (at 29-38), that assertion is incorrect. The legislative record indicates that Section 11341(a) was enacted to encourage mergers and consolidations, which—as Congress must have realized—almost invariably require extensive rearrangement of work forces and alteration of collective bargaining agreements. See *Lowden*, 308 U.S. at 232-234. Moreover, on two occasions—in 1933, and again in 1940—Congress expressly refused to narrow the scope of the ICC's consolidation authority by carving out a special exception for obligations arising from labor agreements. See Fed. Resp. Br. 30-38.

a. As we explained in our opening brief (at 30-34), the Emergency Railroad Transportation Act of 1933 (ERTA) contained temporary provisions (Title I) and permanent provisions (Title II) concerning rail consolidations. Section 10(a) exempted carriers affected by orders under Title I from other legal "restraints or prohibitions," see § 10(a), 48 Stat. 215, but also contained a proviso expressly preserving collective bargaining agreements. *Ibid.* Section 202(15) exempted carriers affected by orders under Title II from other legal "restraints and prohibitions," but it did not contain any such proviso. See § 202(15), 48 Stat. 219. As we also pointed out (Br. 33-34), Congress's decision to include a proviso preserving collective bargaining agreements in the temporary provisions of Title I, but not to include such a proviso in Section 202(15) as part of the permanent provisions of Title II, confirms Congress's intent that Section 202(15) could operate to limit the enforcement of collective bargaining agreements. See,

e.g., Russello v. *United States*, 464 U.S. 16, 23 (1983). And it is Section 202(15) that is now Section 11341(a).

The union respondents attempt, unsuccessfully, to rebut that inference. They argue (Br. 37-38) that Section 10(a) in Title I contained the proviso protecting collective bargaining rights because it addressed the authority of the Federal Railroad Coordinator, who had jurisdiction over labor matters. The unions then contend that there was no need to state this restriction expressly in Section 202(15) in Title II because it dealt with the authority of the ICC, which (in the unions' view) did not have power over labor matters. This distinction between the role of the Coordinator and that of the ICC is both inapposite and flawed. The unions mistakenly presume that carriers acting pursuant to ERTA orders were exempt from legal "restraints or prohibitions" (§ 10(a), 48 Stat. 215; § 202(15), 48 Stat. 219) *only* to the extent that the restraint or prohibition fell within the subject matter jurisdiction of the agency that issued the order. Neither Section 10(a) nor Section 202(15) contained any such limitation; instead, carriers were "relieved from the operation of the antitrust laws * * * and of *all* other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order." § 202(15), 48 Stat. 219 (emphasis added).[8]

In any event, Section 10(a) does not support the union respondents' distinction between the role of the Coordinator and the role of the ICC. Section 10(a)'s exemption and its associated proviso apply to actions taken by the Coordinator *or* the ICC pursuant to Title I. See § 10(a), 48 Stat. 215 ("The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any

[8] As we have observed (p. 5, *supra*), the union respondents employ the same mistaken premise with respect to Section 11341(a).

order of the Coordinator *or Commission* made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws * * * and of all other restraints or prohibitions by law * * *.") (emphasis added). Title I provided that the ICC had authority to review and, if necessary, modify the Coordinator's orders and hence the ICC's power over labor matters was of comparable scope. See ERTA § 9, 48 Stat. 214-215.

b. Nor do the union respondents have an adequate response to Congress's actions in 1940. As we stated in our opening brief (at 35-38), when Congress enacted the Transportation Act of 1940, further amending the ICA, it specifically rejected an amendment that the unions now insist is the law. Representative Harrington's proposed amendment would have prohibited "the impairment of existing employment rights of said employees." See 84 Cong. Rec. 9882 (1939). Congress rejected the Harrington Amendment and enacted in its place a provision (§ 5(2), now codified as Section 11347 of the ICA) that directs the ICC to require a "fair and equitable arrangement" for employees who are adversely affected by ICC approved transactions. § 7, 54 Stat. 906-907. See Fed. Resp. Br. 35-38. The union respondents argue (Br. 39 n.55) that Congress "modified"—rather than "rejected"—the Harrington Amendment. Even if one accepts the unions' semantic distinction, our point remains valid: "Congress d[id] not intend *sub silentio* to enact statutory language that it ha[d] earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987). See *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 175-177 (1961).

6. *The union respondents' reliance on Section 11347 is misplaced.* The union respondents next argue (Br. 45-47) that Section 11347 prohibits the ICC from modifying or

eliminating an employee's contractual rights. The issue decided by the court of appeals and the issue before this Court is whether Section 11341(a) exempts participants from enforcement of contractual obligations. See Pet. App. 12a-19a. More specifically, the question is whether Section 11341(a)'s phrase "all other law" includes the law governing the enforcement of contracts in general and collective bargaining agreements in particular. The unions invite this Court to resolve a wholly distinct issue—the meaning of Section 11347—that the court of appeals did not decide, that the ICC has addressed in the remand proceedings, and that the court of appeals has not yet had an opportunity to review.[9]

Section 11347, which originated in the Transportation Act of 1940 (see p. 11, *supra*), directs the ICC to impose conditions on ICC-approved transactions requiring carriers "to provide a fair arrangement" for employees who are adversely affected by implementation of the transaction. 49 U.S.C. 11347. Rail labor and rail management have been engaged in a longstanding dispute over the content and import of those conditions. Rail labor contends that under Section 11347 the ICC must impose, as a term of the ICC-approved transaction, requirements that the carriers' employees retain all of their rights under the RLA and existing collective bargaining agreements and receive certain additional compensation. See Resp. Br. 45-47. Rail management disagrees, contending that Section 11347 requires the ICC to impose terms that provide for arbitration of disputes arising from work force adjustments and

[9] The union respondents raise a number of other issues that are not presented in this case, including whether the overriding of contractual obligations was, in the particular circumstances, "necessary" to the transaction (Br. 26), and the particular facets of the "Orange Book" agreements (Br. 46 n.59), a matter peculiar to certain aspects of the dispute in No. 89-1028.

for compensation to employees adversely affected by the transaction. See 89-1027 Pet. Br. 43-47.

We submit that if Section 11347 has any relevance to the present issue, it cuts against the unions' position. Congress enacted Section 11347 in recognition that employees would be adversely affected by ICC-approved transactions. See Fed. Resp. Br. 37-38. Congress's requirement of protective conditions with respect to those effects evidences Congress's view that implementation of ICC-approved rail consolidations and mergers is likely to impair collective bargaining agreements. Beyond this limited observation, which takes note of the parallel existence of Section 11347 and its announced purpose, we believe it is neither necessary nor provident for this Court to reach a concluded view on the meaning of that Section. Section 11341(a) concerns the *legal consequences* flowing from ICC approval of a rail transaction. That issue, as *Schwabacher* illustrates, has importance outside of, as well as within, the rail labor context. Section 11347 is concerned solely with what labor terms must be included *as part of the transaction*. The resolution of the Section 11341(a) issue is critical, but it will not finally determine labor's rights.

Moreover, the ICC issued a decision, following the court of appeals' remand of the record in this case, that addresses the ICC's responsibility under Section 11347. See *CSX Corp.—Control—Chessie System, Inc. & Seaboard Coast Line Industries, Inc.*, 6 I.C.C. 2d 715 (1990). That decision is subject to judicial review in the court of appeals. This Court, in turn, will have the opportunity to review, if necessary and after full briefing, the court of appeals' considered judgment on this matter.

7. *The ICC's interpretation of Section 11341(a) does not deprive parties of Fifth Amendment rights.* The union respondents contend (Br. 47-50) that the ICC's interpreta-

tion of Section 11341(a) would deprive the unions (and presumably those they represent) of property in violation of the Due Process and Just Compensation Clauses of the Fifth Amendment. There is no merit to that contention. As the unions concede (Br. 48), it has long been settled that Congress may limit or bar the enforcement of existing contracts if it rationally concludes that such action is in the public interest. See *Wilson* v. *New*, 243 U.S. 332, 348-354 (1917); *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467, 480-481 (1911). Section 11341(a) plainly satisfies that test: it exempts a carrier from enforcement of contractual provisions to the extent necessary to permit the carrier to implement a transaction that has been found to be in the public interest.

The unions' claim of contractual impairment is particularly weak in this case because the collective bargaining agreements at issue were entered into long after Section 11341(a) had become an established part of the legal landscape. Section 11341(a) dates back to the Transportation Act of 1920, and has for 70 years been a part of the legal context in which rail labor agreements have been negotiated. Thus, the union respondents' contracts were necessarily subject to Section 11341(a)'s preemptive effect at the time they were negotiated, and no claim of an unconstitutional taking can arise from the incidence of that effect. Indeed, even if the unions could claim deprivation of a property right, the ICA's labor protective conditions, set forth in Section 11347, would assure compensation for any such deprivation.

8. *The union respondents' arguments cannot be reconciled with the purpose of the ICA consolidation provisions.* The ICA's consolidation provisions are intended to foster those mergers that are in the public interest, while at the same time accommodating to the fullest extent possible the competing claims of persons, including employees,

who may be adversely affected by the transactions. See Fed. Resp. Br. 39-40. The ICA is particularly solicitous of rail labor interests: the ICC must take into account the interests of rail employees when conducting its public interest review (49 U.S.C. 11344(b)) and must impose special conditions to protect the interests of employees who are adversely affected by the transaction (49 U.S.C. 11347). Finally, Section 11341(a) exempts a participant from other law, but only to the extent "necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). Notwithstanding these provisions, the union respondents insist that rail employees are entitled to full enforcement, under the Railway Labor Act, of all of the terms of their collective bargaining agreements. The RLA's "virtually endless" process would pose a serious impediment to the consummation of rail mergers. See Fed. Resp. Br. 40-42. Section 11341(a) does not implicitly except that process, uniquely among "all other law" (49 U.S.C. 11341(a)), from its preemptive sweep.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Acting Solicitor General**

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General Counsel
Interstate Commerce Commission

NOVEMBER 1990

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* The Solicitor General is disqualified in this case.

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Nos. 89-1027 and 89-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
Petitioners,
v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.,*
Respondents.

CSX TRANSPORTATION, INC.,
Petitioner,
v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.,*
Respondents.

**On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

MOTION OF UNION RESPONDENTS FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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December 5, 1990

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IN THE

Supreme Court of the United States

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No. 89-1027

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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Comes now the Union Respondents in the above-designated cases and, pursuant to Rules 25.5 and 25.6 of the Rules of this Court, respectfully request this Court to accept the Supplemental Brief included herein. As shown by the accompanying Supplemental Brief, it is

being submitted to bring to this Court's attention an intervening matter, *viz*, the filing with the United States Court of Appeals for the District of Columbia Circuit of a petition to review the decision by the respondent Interstate Commerce Commission on remand from the judgment by the Court of Appeals which is currently before this Court for review on writs of certiorari. This Supplemental Brief could not have been filed before this case was called for oral argument because the filing of the petition to review did not occur until the day after this case was argued before this Court. This petition, the Union Respondents respectfully submit, is relevant to the exercise of this Court's discretionary jurisdiction over the case at bar.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

During the course of the oral argument held before the Court in these cases on December 3, 1990, questions were raised as to the scope of the issues before the Court in its consideration of the authority of the Interstate Commerce Commission ("ICC" or "Commission") under 49 U.S.C. § 11341(a) and the possible limitations imposed by 49 U.S.C. § 11347 upon 49 U.S.C. § 11341(a).

The purpose of this supplemental brief is to inform the Court that on December 4, 1990, the Union Respondents filed under 28 U.S.C. §§ 2321(a) and 2341, *et seq.*, a petition to review the decisions of the ICC following remand to it from the court of appeals by the decisions and orders of that court now under review before this Court in Nos. 89-1027 and 89-1028. That petition has been designated as Case No. 90-1586 by that court.

The petition requests the court of appeals to decide three issues not reached in its decision in the cases pending before this Court, *viz*, whether 49 U.S.C. § 11341(a) authorizes the ICC to foreclose employees' right to resort to Railway Labor Act procedures to protect their contract rights; whether 49 U.S.C. § 11347 authorizes the ICC to compel employees to arbitrate changes in collective bargaining agreements; and whether the abrogation of employee contractual rights and railroad contractual obligations would amount to the improper and uncompensated confiscation of property in contravention of the guarantees of the Due Process and Just Compensation clauses of the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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May 25, 1990

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 37.3.

STATEMENT OF THE CASE

Under § 11343 of the Interstate Commerce Act ("ICA"), mergers, consolidations, and other acquisitions of control involving two or more rail carriers (hereinafter generally referred to as "consolidations") "may be carried out only with the approval and authorization of

the" Interstate Commerce Commission ("ICC" or "Commission"). 49 U.S.C. § 11343. Under § 11344, when considering such a proposed transaction, the ICC must balance a number of factors, including "the interest of carrier employees affected by the proposed transaction," and "shall approve and authorize" the transaction if "consistent with the public interest." 49 U.S.C. § 11344. And, under § 11347, the ICC in approving such a transaction "shall require" a rail carrier involved in the transaction "to provide a fair arrangement . . . protective of the interests of employees" as is discussed more fully below. 49 U.S.C. § 11347. Section 11341(a) provides that the ICC's "authority" under those provisions "is exclusive," and that each participant in an approved transaction "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction . . . ." 49 U.S.C. § 11341(a).

The basic issue in these cases is whether that exemption from "all other law" applies to provisions of collective bargaining agreements, otherwise enforceable under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, that if enforced would impede the "carrying out" of an approved transaction. That issue arises out of applications of employee protection arrangements, imposed by the ICC upon petitioners under § 11347 of the ICA in approving acquisitions of control over the components of what are now the CSX and the Norfolk Southern rail systems.

In each case, the ICC imposed the so-called *New York Dock* employee protections that it normally imposes in approving consolidations.[1] In general, an employee adversely affected by implementation of the transaction is assured of compensation comparable to that received

[1] See *New York Dock Ry.—Control—Brooklyn E. Dist. Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom., New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

prior thereto for up to six years thereafter, indexed in accordance with general wage increases. An employee required to move is reimbursed for moving expenses and for loss incurred in the sale of home or cancellation of a lease. See 360 I.C.C. at 84-90. The carrier's *quid pro quo* is that it may rearrange work and employee forces, pursuant to an implementing agreement or arbitration award under Art. I, § 4, even if that would not be permissible under collective bargaining agreements. The carrier must give advance notice of a contemplated implementation that "may cause the dismissal or displacement of any employees, or rearrangement of forces . . ."; the carrier and employee representatives negotiate upon an implementing agreement that "shall provide for the selection of forces from all employees involved on a basis . . . appropriate for application in the particular case . . ."; and, if no agreement is reached, either may submit the matter to arbitration. The contemplated change in "operations, services, facilities, or equipment" cannot take place until after such implementing agreement or arbitration award is had, and "any assignment of employees made necessary" as a result "shall be made on the basis" provided therein. See 360 I.C.C. at 85.

In these cases, the ICC upheld (with some revision in one case) arbitration awards under Art. I, § 4, of *New York Dock.*[2] The ICC concluded that the proposed implementations were a carrying out of the transactions it approved; and that such implementations appropriately may include both transfers of work and transfers of employees even if inconsistent with a collective bargaining agreement or the RLA. See *CSX Corp.—Control—*

[2] The ICC has exclusive jurisdiction to review arbitration awards under employee protection arrangements it imposes. See, *e.g., Brotherhood Ry. Carmen* v. *CSX Transp., Inc.*, 855 F.2d 745, 748-749 (11th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3543 (1989); *International Broth. of Elec. Workers* v. *I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988); *United Transp. Union* v. *Norfolk and Western R. Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

Chessie and Seaboard C.L.I., 4 I.C.C.2d 641, 648-650 (1988). As stated by the Commission in its unpublished opinion regarding the Norfolk Southern coordination:

> ". . . [T]here can be no assurance that post-consummation coordinations contemplated as part of the transaction [approved by the ICC] could ever be accomplished if RLA dispute resolution mechanisms were followed. Thus, the [arbitration] panel correctly found . . . that terms of the Commission's order, and specifically the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based upon existing collective bargaining agreements. . . . Moreover, an action taken under our control authorization is immunized from conflicting laws by section 11341(a) [of the ICA]. . . . The proposed transfer . . . is one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that we approved." Pet. in No. 89-1027 at 35a (citations omitted).

The Court of Appeals reversed because, in its view, § 11341(a) of the ICA "does not grant the ICC its claimed power to override provisions of a" collective bargaining agreement. *Brotherhood of Ry. Carmen* v. *I.C.C.*, 880 F.2d 562, 574 (D.C. Cir. 1989). In exempting the carrying out of approved transactions from "the antitrust laws and from all other law," § 11341(a) does not "say that the ICC may also override contracts" (*id.* at 567); and "Congress focused nearly exclusively, in the hearings and debates . . ., on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract" (*id.* at 570).

The court below declined to consider whether that "immunity provision . . . may operate to override provisions of the RLA" (*id.* at 570), since, among other things, in "light of our holding that § 11341(a) does not empower the ICC to override a [collective bargaining agreement], it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA" (*id.* at 572). Thus, it remanded the cases to the ICC "to determine whether there is any live RLA issue remaining" (*id.* at 573); and, also, to reconsider its "theory that the labor protective conditions required by § 11347 of the Act are exclusive," and "its related assertion . . . that § 4 [Art. I] of the *New York Dock* conditions gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, and to override any contrary provision of a" collective bargaining agreement (*ibid.*).

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association which includes most of the nation's major railroads (including petitioners) among its members. The NRLC represents members in multi-employer collective bargaining under the RLA and with respect to other labor relations issues of general concern to the railroad industry, including those arising in litigation before the courts.

As we shall show in our Argument, the Congress since 1920 has encouraged railroad consolidations to further the public interest in more economical and efficient rail service. Most of the major railroad systems are the product of past consolidations, some of which have yet to be fully consummated, and congressional policy continues to favor further such transactions. However, if the component parts, and their respective work forces, cannot in fact be consolidated insofar as inconsistent with a collective bargaining agreement, unless and until such agreement is changed in accordance with the RLA, a true consolidation will be impracticable if not impossible.

It is still generally true, as it was when *United States* v. *Lowden*, 308 U.S. 225 (1939), was decided, that the

seniority rights of railroad employees "are restricted in their operation to those members of groups who are employed at specific points or divisions." *Id.* at 233. An employee can neither exercise seniority to transfer to another seniority district nor be reassigned thereto by the carrier. If an employee voluntarily accepts employment in another seniority district, his seniority therein dates from that time so that he commences at the bottom of the seniority roster.[3]

The significance of this in a merger situation perhaps can best be illustrated by a hypothetical example. Assume that an operation on component A utilizing 50 employees is consolidated into a like operation on component B utilizing 100 employees, and that the consolidated operation requires 125 employees at the outset. If the seniority rules can be overridden, an implementing agreement or award determines how the 125 active employees from the 150-man combined workforce are selected and their seniority rights accommodated; the other 25 are furloughed, until recalled to work because of increasing business or attrition of more senior employees, and paid their guaranteed compensation for up to six years. If those rules cannot be overridden, it is unlikely that the 50 employees at A will accept an offer to work at B. If they remain at A, they will be entitled to guaranteed compensation for six years without working, and they would have bottom seniority if they move to B. In short, instead of working 125 experienced employees and paying a protective allowance to no more than 25, the carrier might have to hire 25 new employees to work with the 100 already employed at B and pay the protective allowance to all 50 that worked at A for up to six years.

Thus, if the seniority rules cannot be overridden, an actual consolidation could well mean that the carrier

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[3] See, *e.g.*, *Seniority Practices—Railroad Operating Employees and Other Industries*, App. Vol. III to Report of the Presidential Railroad Commission (1962) at 227, 230-235.

for years would pay a significantly greater number of employees (many of whom would not be working) than if such consolidation is not effectuated, while utilizing a less experienced work force. Moreover, collective bargaining agreements often include scope rules or other provisions that the unions contend prevent a transfer of work from one component of the system to another. Such a contention was upheld by the arbitrator in the CSX proceedings involved in these cases, which could have barred the transfer of any work unless, as the arbitrator determined with the approval of the ICC, the implementing award overrides that limitation.[4]

If implementations of approved consolidations must be delayed until the unions agree in bargaining under the RLA, or the carriers have exhausted the "major dispute" procedures governing such bargaining, the unions could substantially delay and as a practical matter likely could prevent such implementations at any time. As this Court has observed, those procedures are notoriously "long and drawn out" and "almost interminable."[5] In

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[4] In view of that ruling, the ICC did not reach the issue of whether the arbitrator's interpretation of the agreement was erroneous as the carrier contends. *See* 4 I.C.C.2d at 647, 649-650.

[5] *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966); *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969). See, also, *Burlington Northern* v. *Maintenance Employes*, 481 U.S. 429, 444 (1987) ("virtually endless"). The major dispute procedures are succinctly outlined, in *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969), as follows: "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the service of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of

the NRLC's experience, they often require two or more years to exhaust. And if exhausted without an agreement, the unions can resort to primary strikes and to secondary picketing extending to the carriers nationwide.[6] Hence, the NRLC urges this Court to reverse the decision below. Otherwise, the efficiencies and economies that Congress anticipates from railroad consolidations seldom could be realized in fact.

SUMMARY OF ARGUMENT

In holding that the exemption from "all other law" is inapplicable to railroad collective bargaining agreements, without considering whether that exemption is applicable to the RLA, the Court of Appeals misconceived the relationships between such agreements and the RLA. The agreements are made and enforced under the RLA to which the plain terms of the exemption apply even if, as the court below erroneously concluded, it is not applicable to common-law obligations.

ARGUMENT

The Court of Appeals considered railroad collective bargaining agreements to be enforceable under the common law, and concluded that the exemption in § 11341(a) of the ICA from "all other law" does not extend to such common-law obligations. It held that the exemption does not provide a basis for overriding a labor agreement that would impede an implementation of a consolidation approved by the ICC under § 11343 without deciding whether that exemption may be applicable to the RLA.

essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10."

[6] See, *e.g., Burlington Northern* v. *Maintenance Employes, supra,* 481 U.S. at 450-453; *Railway Trainmen* v. *Terminal Co., supra,* 394 U.S. at 378-379, 384-385.

That approach reflects a radical misconception of the relationships between railroad labor agreements and the RLA. The holding that the § 11341(a) exemption is limited to statutory law is clearly erroneous in our opinion,[7] but that error essentially is irrelevant by reason of the Court's even more astonishing error in concluding that railroad labor agreements are enforceable under common law. Those agreements are bargained, construed and enforced under the RLA.[8] That is what the RLA is all about. But for the RLA, the railroads could terminate such agreements at will including any obligations thereunder that might impede implementation of a transaction approved by the ICC.[9] And, the RLA undoubtedly is a

[7] The common law is "law" within any ordinary meaning of that term just as much as is statutory law. See, *e.g., Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 78-80 (1938). Moreover, it simply is not believable that the Congress intended, for example, to prevent statutes enacted by State legislatures from impeding the implementation of approved transactions but to permit State courts to achieve the same result through application of their common law doctrines. We note that, when enacted in 1920, the first predecessor of § 11341(a) also expressly applied to the antitrust laws. That was only nine years after the well-known decisions construing the Sherman Act as incorporating the "rule of reason" developed in the common law respecting unreasonable restraints of trade. *Standard Oil Co.* v. *United States,* 221 U.S. 1, 50-62 (1911); *United States* v. *American Tobacco Co.,* 221 U.S. 106, 178-180 (1911). See *California* v. *American Stores Company,* 58 U.S.L.W. 4529, 4532-4533 (1990), regarding the controversy that arose out of those "most famous" decisions. Surely, the Congress did not intend to permit approved transactions to be subjected to common law rules of liability as unreasonable restraints of trade.

[8] Among many possible citations, even if limited to decisions by this Court, see, *e.g., Andrews* v. *Louisville & Nashville R. Co.,* 406 U.S. 320 (1972); *Shore Line* v. *Transportation Union, supra,* 396 U.S. at 156; *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 722-728 (1945), on rehearing, 327 U.S. 661 (1946).

[9] "Another among the railroad industry practices which influenced the provisions of the Railway Labor Act was that of negotiating open-end collective bargaining agreements. Railroad agreements do not expire on a given date but remain in effect until one party or

"law" to which the § 11341(a) exemption on its face applies.

Thus, the issue of whether the § 11341(a) exemption affords a basis for obviating obstacles posed by labor agreements to a carrier's implementation of a transaction approved by the ICC is subsumed within the issue of whether that exemption applies to the RLA. The "paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms of an enactment of Congress. See *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 232." *Teamsters Union* v. *Oliver*, 358 U.S. 283, 296-297 (1959). See also, *e.g.*, *California* v. *Taylor*, 353 U.S. 553, 561 (1957).[10] *Cf.*, *Schwabacher* v. *United States*,

the other proposes modification of certain of the agreement's provisions, whereupon negotiations take place on the specific issues raised and, when agreement is reached, the contract is modified accordingly. The earliest railroad agreements known, dating back to the last quarter of the 19th Century, were of this open-ended type and the practice continues throughout the industry to the present time." Burgoon, *Mediation under the Railway Labor Act*, included in *The Railway Labor Act at Fifty* (GPO, 1977), at 71, 72. Under the common law, such open-ended agreements would be terminable at will by either party. See, *e.g.*, *Hodge* v. *Evans Financial Corp.*, 707 F.2d 1566, 1568 (D.C. Cir. 1983); *Martin* v. *Equitable Life Assur. Soc. of U.S.*, 553 F.2d 573, 574 (8th Cir. 1977); 17A C.J.S., Contracts, § 398, p. 478.

[10] The Court of Appeals previously had recognized that application of the § 11341(a) exemption to alleged rights under a collective bargaining agreement turned upon whether the exemption is applicable to the RLA. In *Brotherhood of Locomotive Engineers* v. *I.C.C.*, 761 F.2d 714 (D.C. Cir. 1985), the ICC had relied upon that exemption in rejecting a union contention that the Commission's approval of a "consolidation . . . did not alter previous labor arrangements" between the unions and carrier parties to that transaction. 761 F.2d at 719. Although concluding that the exemption could apply to the RLA (and thus to alleged contractual rights under that statute) in appropriate circumstances (see 761 F.2d at 722-724), the Court of Appeals disagreed with the ICC's view that the exemption is self-executing and remanded the case for an explanation of why

334 U.S. 182, 199-202 (1948), where the Court held that the predecessor of § 11341(a) exempted the carrier parties to an approved transaction from contractual obligations enforceable under State law inconsistent with implementation of that transaction.

The exemption from "all other law" hardly could be phrased more broadly and there can be no doubt that the RLA on its face is an "other law." As this Court once again reiterated in *Kaiser Aluminum & Chemical Corporation* v. *Bonjorno*, 58 U.S.L.W. 4421, 4423 (1990):

> "The starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' "

The Congress has not expressed an intent to exclude the RLA from the scope of the exemption plainly expressed in § 11341(a). Hence, as the lower courts consistently have recognized, that exemption is applicable in appropriate circumstances to the RLA.[11] Hence, it also is ap-

application of the exemption so as to terminate the unions' "asserted right to participate in crew selection is necessary . . . ." 761 F.2d at 725; generally, at 724-725). This Court reversed essentially on the ground that the unions had not raised their contentions before the ICC in a timely manner. *ICC* v. *Locomotive Engineers*, 482 U.S. 270 (1987). In a concurring opinion by Justice Stevens, four members of the Court agreed with the "ICC's argument that § 11341 is self-executing and that the Commission need not make any explicit necessity findings" (482 U.S. at 297), and thus would have reversed the Court of Appeals for that reason.

[11] In addition to the case discussed in n.10 above, see, *e.g.*, *Broth. of Loco. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 799-801 (1st Cir. 1986), *cert. denied*, 479 U.S. 829 (1986); *Missouri Pacific R. Co.* v. *United Transp. Union*, 782 F.2d 107, 111 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987); *Burlington Northern, Inc.* v. *American Ry. Super. Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 279-280 (6th Cir. 1972); *Nemitz* v. *Norfolk and Western Railway Co.*, 436 F.2d 841, 845 (6th Cir. 1971); *aff'd*, 404 U.S. 37

plicable to collective bargaining agreements enforceable under the RLA insofar as they would impede the carrying out of a transaction approved by the ICC. The court of appeals erred in holding to the contrary.[12]

(1971); *Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963); *Texas & N.O. Ry.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151, 161-162 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); *Ry. Labor Executives* v. *Guilford Transp. Indus.*, 667 F. Supp. 29, 35 (D. Me. 1987), *aff'd* (table), 843 F.2d 1383 (1st Cir. 1988), *cert. denied*, 57 U.S.L.W. 3839 (1989).

[12] Assuming that it otherwise is applicable, the exemption from "all other law" applies insofar "as necessary to let" a participant in a transaction approved by the ICC "carry out the transaction . . . ." Thus, that "as necessary" requirement is not applicable to the transaction itself, but to the carrying out of the transaction in a manner that comes within the scope of the ICC's approval. See *ICC* v. *Locomotive Engineers*, *supra*, 482 U.S. at 298 (concurring opinion). Since the ICC held that the implementations proposed by the carriers in these cases do come within the scope of its approvals, and authorized certain transfers of work and employees in connection therewith, the only issue under the "as necessary" requirement is whether the RLA or agreements thereunder would impede the carriers from carrying out those rulings by the ICC if not exempted under § 11341(a). If the carriers otherwise would have to comply with requirements of the RLA before transferring such work or employees, then the exemption is "necessary" and is applicable to relieve the carriers of such requirements and from any inconsistent provisions of agreements under the RLA.

CONCLUSION

The decision by the Court of Appeals should be reversed.

Respectfully submitted,

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